250 N.C. App.—No. 1 Pages 1-184

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

JANUARY 25, 2019

MAILING ADDRESS: The Judicial Department
P. O. Box 2170, Raleigh, N. C. 27602-2170

THE COURT OF APPEALS
OF
NORTH CAROLINA

Chief Judge

LINDA M. McGEE

Judges

WANDA G. BRYANT
ANN MARIE CALABRIA
RICHARD A. ELMORE
DONNA S. STROUD
ROBERT N. HUNTER, JR.
CHRIS DILLON
MARK DAVIS
RICHARD D. DIETZ
JOHN M. TYSON
LUCY INMAN
VALERIE J. ZACHARY
WENDY M. ENOCHS[1]
PHIL BERGER, JR.[2]
HUNTER MURPHY[3]
JOHN S. ARROWOOD[4]

Emergency Recall Judges

GERALD ARNOLD
RALPH A. WALKER

Former Chief Judges

GERALD ARNOLD
SIDNEY S. EAGLES, JR.
JOHN C. MARTIN

Former Judges

WILLIAM E. GRAHAM, JR.
JAMES H. CARSON, JR.
J. PHIL CARLTON
BURLEY B. MITCHELL, JR.
HARRY C. MARTIN
E. MAURICE BRASWELL
WILLIS P. WHICHARD
DONALD L. SMITH
CHARLES L. BECTON
ALLYSON K. DUNCAN
SARAH PARKER
ELIZABETH G. McCRODDEN
ROBERT F. ORR
SYDNOR THOMPSON
JACK COZORT
MARK D. MARTIN
JOHN B. LEWIS, JR.
CLARENCE E. HORTON, JR.
JOSEPH R. JOHN, SR.
ROBERT H. EDMUNDS, JR.
JAMES C. FULLER
K. EDWARD GREENE
RALPH A. WALKER
HUGH B. CAMPBELL, JR.
ALBERT S. THOMAS, JR.
LORETTA COPELAND BIGGS
ALAN Z. THORNBURG
PATRICIA TIMMONS-GOODSON
ROBIN E. HUDSON
ERIC L. LEVINSON
JAMES A. WYNN, JR.
BARBARA A. JACKSON
CHERI BEASLEY
CRESSIE H. THIGPEN, JR.
ROBERT C. HUNTER
LISA C. BELL
SAMUEL J. ERVIN, IV
SANFORD L. STEELMAN, JR.
MARTHA GEER
LINDA STEPHENS[5]
J. DOUGLAS McCULLOUGH[6]

[1]Appointed 1 August 2016 [2]Sworn in 1 January 2017 [3]Sworn in 1 January 2017 [4]Appointed 24 April 2017
[5]Retired 31 December 2016 [6]Retired 24 April 2017

Clerk
DANIEL M. HORNE, JR.

Assistant Clerk
Shelley Lucas Edwards

OFFICE OF STAFF COUNSEL

Director
Leslie Hollowell Davis

Assistant Director
David Alan Lagos

Staff Attorneys
John L. Kelly
Bryan A. Meer
Eugene H. Soar
Nikiann Tarantino Gray
Michael W. Rodgers
Lauren M. Tierney
Justice D. Warren

ADMINISTRATIVE OFFICE OF THE COURTS

Director
Marion R. Warren

Assistant Director
David F. Hoke

OFFICE OF APPELLATE DIVISION REPORTER

H. James Hutcheson
Kimberly Woodell Sieredzki
Jennifer C. Peterson

COURT OF APPEALS

CASES REPORTED

FILED 18 OCTOBER 2016

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

ADMINISTRATIVE LAW

Administrative Law—exhaustion of administrative remedies—remittance statement—findings of fact—The trial court erred by dismissing plaintiffs' complaint for unpaid Medicaid claims based on lack of subject matter jurisdiction for failure to exhaust the available administrative remedies prior to filing suit. The remittance statement was not the notice of a final agency decision that is required by N.C.G.S. § 150B-23(f). Further, the trial court also erred in findings nos. 32 and 33 by including a reconsideration review as a mandatory step in the process by which a provider seeks to exhaust administrative remedies prior to filing suit. **Abrons Family Practice & Urgent Care, PA v. N.C. Dep't of Health & Human Servs., 1.**

APPEAL AND ERROR

Appeal and Error—interlocutory orders and appeals—denial of motion for summary judgment—substantial right—governmental and public official immunity—Although the denial of a motion for summary judgment is generally a nonappealable interlocutory order, orders denying dispositive motions based on the defenses of governmental and public official immunity affect a substantial right and are immediately appealable. **Fullwood v. Barnes, 31.**

order was vacated insofar as it provided that reunification efforts were not required and remanded for further proceedings. **In re T.W., 68.**

Child Abuse, Dependency, and Neglect—legal custody of aunt—failure to verify adequate resources for care—The trial court violated N.C.G.S. § 7B-906.1(j) (2015) in a child neglect and dependency case by placing a minor child in the legal custody of his maternal aunt without verifying she would have adequate resources to care appropriately for the juvenile. This issue was remanded for further proceedings. **In re T.W., 68.**

Child Abuse, Dependency, and Neglect—neglect—chronic or toxic exposure to alcohol or controlled substances—required findings at disposition—The trial court erred in a child neglect case by ceasing reasonable reunification efforts based on respondent mother's chronic or toxic exposure to alcohol or controlled substances that causes impairment of or addiction in the juvenile. N.C.G.S. § 7B-901(c)(1)(e) required the trial court to make findings at disposition that a court of competent jurisdiction had already determined that the parent allowed the continuation of chronic or toxic exposure. This portion of the trial court's disposition order was reversed. **In re G.T., 50.**

Child Abuse, Dependency, and Neglect—neglect—sufficiency of findings of fact—The trial court did not err by adjudicating a minor child as neglected. The findings were sufficient for the trial court to conclude that the child did not receive proper care, supervision, or discipline from respondent mother and that he lived in an environment injurious to his welfare. It is proper for a trial court to adjudicate a juvenile neglected, even if the juvenile never actually resided in the parent's home. **In re G.T., 50.**

Child Abuse, Dependency, and Neglect—waiver of further review hearings—required findings of fact—Although defendant mother claimed in a child neglect and dependency case that the trial court erred by waiving further review hearings without making the findings of fact required by N.C.G.S. § 7B-906.1(n), it was undisputed that the trial court did not make these findings. If on remand the court chooses to waive subsequent permanency planning hearings, it must comply with this requirement. **In re T.W., 68.**

CHILD CUSTODY AND SUPPORT

Child Custody and Support—custody modification—primary physical custody—best interest of child—The trial court did not err in a child custody modification case by awarding primary physical custody of the children to plaintiff father. Defendant mother failed to make a persuasive argument that it was not in the best interest of the children. **Scoggin v. Scoggin, 115.**

Child Custody and Support—custody modification—written judgment different from oral pronouncement—The court did not err in a child custody modification case by entering an order that reached a conclusion that differed from its oral pronouncement. Entry of judgment based upon oral rendition of judgments is no longer allowed in civil matters. Judgments and orders are only entered when they are reduced to writing, signed by the judge, and filed with the clerk of court. **Scoggin v. Scoggin, 115.**

TERMINATION OF PARENTAL RIGHTS

Termination of Parental Rights—psychologist testimony—weight of evidence—The trial court did not err by terminating respondent mother's parental rights. The trial judge was the trier of fact and determined that under the unique circumstances of this case and the characteristics of this juvenile, an expert evaluation by a psychologist who had not worked with the juvenile and who lacked experience in juvenile court matters was not helpful. **In re K.G.W., 62.**

SCHEDULE FOR HEARING APPEALS DURING 2018

NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks in 2018:

January 8 and 22

February 5 and 19

March 5 and 19

April 2, 16 and 30

May 14

June 4

July None

August 6 and 20

September 3 and 17

October 1, 15 and 29

November 12 and 26

December 10

Opinions will be filed on the first and third Tuesdays of each month.

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

ABRONS FAMILY PRACTICE AND URGENT CARE, PA; NASH OB-GYN ASSOCIATES, PA; HIGHLAND OBSTETRICAL-GYNECOLOGICAL CLINIC, PA; CHILDREN'S HEALTH OF CAROLINA, PA; CAPITAL NEPHROLOGY ASSOCIATES, PA; HICKORY ALLERGY & ASTHMA CLINIC, PA; HALIFAX MEDICAL SPECIALISTS, PA; AND WESTSIDE OB-GYN CENTER, PA; INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS

v.

NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, AND COMPUTER SCIENCES CORPORATION, DEFENDANTS

No. COA15-1197

Filed 18 October 2016

Administrative Law—exhaustion of administrative remedies—remittance statement—findings of fact

The trial court erred by dismissing plaintiffs' complaint for unpaid Medicaid claims based on lack of subject matter jurisdiction for failure to exhaust the available administrative remedies prior to filing suit. The remittance statement was not the notice of a final agency decision that is required by N.C.G.S. § 150B-23(f). Further, the trial court also erred in findings nos. 32 and 33 by including a reconsideration review as a mandatory step in the process by which a provider seeks to exhaust administrative remedies prior to filing suit.

Judge McCULLOUGH dissenting.

Appeal by plaintiffs from order entered 12 June 2015 by Judge Gregory P. McGuire in Wake County Superior Court. Heard in the Court of Appeals 9 June 2016.

Williams Mullen, by Camden R. Webb, Elizabeth C. Stone, and Mark S. Thomas, for plaintiffs-appellants.

Attorney General Roy Cooper, by Special Deputy Attorney General Olga Vysotskaya de Brito and Special Deputy Attorney General Amar Majmundar, for defendant-appellee North Carolina Department of Health and Human Services.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Jennifer K. Van Zant, Charles F. Marshall, III, and Bryan Starrett, and Baker Botts L.L.P., by Bryan C. Boren, Jr., Van H. Beckwith, and Ryan L. Bangert, for defendant-appellee Computer Sciences Corporation.

ZACHARY, Judge.

Abrons Family Practice and Urgent Care, PA; Nash OB-GYN Associates, PA; Highland Obstetrical-Gynecological Clinic, PA; Children's Health of Carolina, PA; Capital Nephrology Associates, PA; Hickory Allergy & Asthma Clinic, PA; Halifax Medical Specialists, PA; and Westside OB-GYN Center, PA ("plaintiffs") appeal from an order of the trial court granting a motion of the North Carolina Department of Health and Human Services ("DHHS") and Computer Sciences Corporation ("CSC") (collectively "defendants") to dismiss plaintiffs' complaint for lack of subject matter jurisdiction. For the reasons stated below, we reverse the order of the trial court.

I. Factual and Procedural Background

"Medicaid is a federal program that subsidizes the States' provision of medical services to . . . 'individuals, whose income and resources are insufficient to meet the costs of necessary medical services.' [42 U.S.C.A.] §1396-1." *Armstrong v. Exceptional Child Ctr., Inc.*, __ U.S. __, __, 191 L. Ed. 2d 471, 476 (2015). Plaintiffs are medical practices in North Carolina that provide care to Medicaid-eligible patients and that have Medicaid contracts with the State of North Carolina. DHHS is an administrative agency of the State of North Carolina and is the single state agency designated to administer and operate the North Carolina Medicaid plan. CSC is a Nevada corporation, with its principal office in Falls Church, Virginia.

In 2003, the federal Centers for Medicare and Medicaid Services ("CMS") required the State of North Carolina to replace its Medicaid

Management Information System ("MMIS"). In December 2008, the State awarded the MMIS contract to CSC. The contract required CSC to design and operate a new MMIS system. The new system, NCTracks, was implemented on 1 July 2013, and was intended to manage the enrollment of medical, dental, and other health care providers (hereafter "providers") and to process claims by providers for payment for services provided to North Carolina Medicaid recipients.

On 21 January 2014, plaintiffs filed a "First Amended Class Action Complaint" on behalf of themselves and all others similarly situated against defendants. Plaintiffs' complaint also named SLI Global Solutions, Inc. (SLI) as a defendant; however, SLI is not a party to this appeal. Plaintiffs alleged that the implementation of NCTracks had been a "disaster, inflicting millions of dollars in damages upon North Carolina's Medicaid providers." Plaintiffs asserted that CSC had breached its duty to develop software that complied with Medicaid reimbursement rules, allowed providers to enroll as Medicaid providers, and that processed and paid providers' claims, and had also been negligent in its design and implementation of NCTracks. Plaintiffs sought damages based on claims of negligence and unfair and deceptive trade practices ("UDTP") against CSC and SLI; and breach of contract and violations of Art. I, § 19 of the North Carolina Constitution against DHHS. Plaintiffs also sought a declaratory judgment that DHHS was in violation of the Medicaid reimbursement rules. In their complaint, plaintiffs alleged that it would be futile or impossible for them to attempt to exhaust the available administrative remedies for a variety of reasons, including the following:

> DHHS and CSC have also placed thousands of reimbursement claims in "limbo" by failing to issue decisions on reimbursement claims. The providers have been informed by DHHS and CSC that they must resubmit the claims, and providers' claims have been resubmitted as many as a dozen times, with no reimbursement and no final determination that the amount is or is not payable. The providers therefore have no administrative remedies available to them for such claims because they have no agency decision from which to appeal.

This matter was subsequently "designated a mandatory complex business case by Order of the Chief Justice of the North Carolina Supreme Court[.]" On 4 April 2014, DHHS and CSC each filed a motion to dismiss pursuant to Rule 12(b)(1), 12(b)(2), and 12(b)(6) of the North Carolina Rules of Civil Procedure. Following a hearing held on 15 April

2015, the trial court entered an "Amended Opinion and Order on Motions to Dismiss" on 12 June 2015. The trial court ruled that plaintiffs' "primary claim" was for unpaid Medicaid claims and that plaintiffs had failed to exhaust the available administrative remedies prior to filing their complaint. The court dismissed plaintiffs' complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) (2015) for lack of subject matter jurisdiction, based upon plaintiffs' failure to exhaust the available administrative remedies prior to filing suit. The court dismissed as moot defendants' motions for dismissal pursuant to N.C. Gen. Stat. § 1A-1 Rule 12(b)(2) and 12(b)(6). Plaintiffs noted an appeal to this Court.

II. Standard of Review

Our Court "review[s] Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction *de novo* and may consider matters outside the pleadings." *Harris v. Matthews*, 361 N.C. 265, 271, 643 S.E.2d 566, 570 (2007) (citations omitted).

III. Discussion

A. Introduction

The issue raised by this appeal is whether the trial court correctly determined that plaintiffs failed to show that it would have been futile or impossible for them to attempt to exhaust administrative remedies prior to filing suit. On appeal, plaintiffs argue that DHHS has a legal obligation to render a final decision on each Medicaid claim that it denies, to inform the provider of its final decision, and to notify the provider of the provider's right to seek a contested case hearing. Plaintiffs contend that "[a]t no time do DHHS or CSC issue a final decision on any claims" and assert that a provider cannot initiate the process of exhausting its administrative remedy until DHHS issues a final decision from which the provider can appeal. We conclude that plaintiffs' arguments on this issue have merit and that the trial court erred in its analysis of the issue of exhaustion of administrative remedies.

B. Exhaustion of Administrative Remedies: General Rule

Judicial review of the final decision of a State agency is governed by the Administrative Procedure Act (APA), N.C. Gen. Stat. § 150B-1 *et seq.*, which applies to "both trial and appellate court review of administrative agency decisions." *N. C. Dept. of Correction v. Myers*, 120 N.C. App. 437, 440, 462 S.E.2d 824, 826 (1995). N.C. Gen. Stat. § 150B-43 (2015) states in relevant part that "[a]ny party or person aggrieved by the final decision in a contested case, and who has exhausted all administrative remedies

made available to the party or person aggrieved by statute or agency rule, is entitled to judicial review of the decision under this Article[.]" "An action is properly dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction where the plaintiff has failed to exhaust administrative remedies." *Johnson v. Univ. of N.C.*, 202 N.C. App. 355, 357, 688 S.E.2d 546, 548 (2010) (internal quotations omitted). "[T]he exhaustion requirement may be excused if the administrative remedy would be futile or inadequate." *Justice for Animals, Inc. v. Robeson Cty.*, 164 N.C. App. 366, 372, 595 S.E.2d 773, 777 (2004) (citing *Huang v. N.C. State University*, 107 N.C. App. 710, 715, 421 S.E.2d 812, 815 (1992)).

N.C. Gen. Stat. § 150B-22 (2015) sets out the general policy for resolution of disputes between a State agency and another party:

> It is the policy of this State that any dispute between an agency and another person that involves the person's rights, duties, or privileges . . . should be settled through informal procedures. In trying to reach a settlement through informal procedures, the agency may not conduct a proceeding at which sworn testimony is taken and witnesses may be cross-examined. If the agency and the other person do not agree to a resolution of the dispute through informal procedures, either the agency or the person may commence an administrative proceeding to determine the person's rights, duties, or privileges, at which time the dispute becomes a "contested case."

The APA applies to appeals by a Medicaid provider. N.C. Gen. Stat. § 108C-12 (2015) states that:

> (a) General Rule. Notwithstanding any provision of State law or rules to the contrary, this section shall govern the process used by a Medicaid provider or applicant to appeal an adverse determination made by the Department.
>
> (b) Appeals. Except as provided by this section, a request for a hearing to appeal an adverse determination of the Department under this section is a contested case subject to the provisions of Article 3 of Chapter 150B of the General Statutes.

Thus, pursuant to N.C. Gen. Stat. § 108C-12, a contested case hearing is the administrative remedy that a provider must pursue before filing a civil suit. N.C. Gen. Stat. § 108C-2(1) defines an "adverse determination"

as "[a] final decision by the Department to deny, terminate, suspend, reduce, or recoup a Medicaid payment[.]" N.C. Gen. Stat. § 150B-23(a) (2015) provides that a "contested case shall be commenced by . . . filing a petition with the Office of Administrative Hearings[.]" The time within which a party may petition for a contested case hearing is limited by N.C. Gen. Stat. § 150B-23(f), which provides in relevant part that:

> (f) Unless another statute or a federal statute or regulation sets a time limitation for the filing of a petition in contested cases against a specified agency, the general limitation for the filing of a petition in a contested case is 60 days. The time limitation, whether established by another statute, federal statute, or federal regulation, or this section, shall commence when notice is given of the agency decision to all persons aggrieved who are known to the agency[.] . . . The notice shall be in writing, and shall set forth the agency action, and shall inform the persons of the right, the procedure, and the time limit to file a contested case petition. . . . .

An appellant's compliance with the time limit of N.C. Gen. Stat. § 150B-23(f) is a jurisdictional requirement. "In order for the OAH to have jurisdiction over [a] petitioner's appeal . . . [a] petitioner is required to follow the statutory requirements . . . for commencing a contested case." *Nailing v. UNC-CH*, 117 N.C. App. 318, 324, 451 S.E.2d 351, 355 (1994). Thus, "timely filing of a petition is necessary to confer subject matter jurisdiction on the agencies as well as the courts[.]" *Gray v. N.C. Dep't of Env't, Health & Nat. Res.*, 149 N.C. App. 374, 378, 560 S.E.2d 394, 397 (2002).

In sum, the general rule, upon which the trial court and the parties are in apparent agreement, is as follows:

> 1. The APA applies to a provider who wants to challenge DHHS' denial of a claim for Medicaid payment.
>
> 2. Under the APA, a provider must exhaust administrative remedies, in this case by pursuing a contested case hearing, prior to filing a claim in superior court, unless the administrative remedy is inadequate or pursuing the remedy would be futile.
>
> 3. In order to pursue a contested case hearing, a provider must file a petition for a contested case hearing within

> 60 days of receiving notice, in writing, of DHHS' adverse determination of the provider's claim. An adverse determination is DHHS' final decision to "deny . . . a Medicaid payment" to a provider.

C. Administrative Appeal Process

Plaintiffs assert that, in response to the submission by a provider of a claim for a Medicaid payment, DHHS neither makes a final agency decision regarding the claim nor provides the notice of such decision required under N.C. Gen. Stat. § 150B-23(f). Plaintiffs argue that without a final agency decision from which to appeal, it is impossible for them to pursue a hearing before the OAH. Evaluation of the merits of plaintiffs' argument requires a review of the document issued by DHHS.

The parties agree that when a provider submits a claim for reimbursement, DHHS responds by sending the provider a document known as a Remittance Statement. The Remittance Statement notifies the provider of DHHS' initial disposition of the provider's claim. Claims are either paid, denied, or placed in "pending" status. In its appellee's brief, CSC describes the contents and legal significance of the Remittance Statement as follows:

> When faced with a denial of a reimbursement claim for Medicaid-covered services, a provider seeking relief may choose to do one of two things: (1) resubmit the claim, generally with new or updated information or (2) seek administrative review with the North Carolina Division of Medicaid Assistance ("DMA"). 10A NCAC 22J .0102(a). If the reconsideration review process proves unsuccessful, a provider may initiate a contested case proceeding before the Office of Administrative Hearings ("OAH"). . . . A provider's option to pursue resubmission or administrative remedies is triggered by the provider's receipt of a Remittance Statement. A Remittance Statement notifies a provider whether reimbursement claims have been approved and paid, denied, or placed in pending status.

The reconsideration review is an informal review process. Several provisions of the North Carolina Administrative Code (NCAC) that are cited by the trial court and by defendants address a provider's right to seek a reconsideration review:

1. 10A NCAC 22J .0101.

> The purpose of these regulations is to specify the rights of providers to appeal reimbursement rates, payment denials, disallowances, payment adjustments and cost settlement disallowances and adjustments. . . .

2. 10A NCAC 22J .0102.

> (a) A provider may request a reconsideration review within 30 calendar days from receipt of final notification of . . . payment denial[.] . . . Final notification of . . . payment denial . . . means that all administrative actions necessary to have a claim paid correctly have been taken by the provider and DMA or the fiscal agent has issued a final adjudication. If no request is received within . . . [the 30] day period[], the state agency's action shall become final. . . .
>
> . . .

3. 10A NCAC 22J .0104.

> If the provider disagrees with the reconsideration review decision he may request a contested case hearing[.]

It is undisputed that if a provider does not seek a reconsideration review within 30 days of receiving the Remittance Statement, the interim decision stated in the Remittance Statement "shall become final." In the alternative, a provider may resubmit a denied claim to DHHS at any time within 18 months of receiving the Remittance Statement. The parties disagree sharply on the role played by the Remittance Statement in the appeals process and on whether the trial court properly concluded that the Remittance Statement met the definition of a final notice of an adverse determination by DHHS that is required by N.C. Gen. Stat. § 150B-23(f).

D. Remittance Statement

After a careful review of the record, briefs, and applicable law, we reach the following conclusions about the nature of the administrative remedy that plaintiffs must pursue before filing a claim in superior court, and about the role played by the Remittance Statement in the procedures with which a provider must comply in order to seek an administrative remedy for the denial of a Medicaid claim.

1. The administrative remedy that plaintiffs are required to exhaust prior to filing suit in superior court is a contested case hearing, there being no legal requirement that plaintiffs must pursue a reconsideration review before filing a petition for a contested case hearing.

N.C. Gen. Stat. § 150B-22 states that it is the policy of the State that disputes between an agency and a party should be resolved through informal means. However, neither § 150B-22 nor any other statute or regulation *requires* that a provider pursue the informal remedy of a reconsideration review. Moreover, 10A NCAC 22J .0102 expressly states that if a provider does not request a reconsideration review within 30 days of receiving a Remittance Statement, "the state agency's action shall become final." Thus, the pertinent NCAC regulation clearly anticipates that a provider may choose not to pursue a reconsideration review.

2. DHHS is the only entity that has the authority to render a final decision on a contested Medicaid claim. It is DHHS' responsibility to make the final decision and to furnish the provider with written notification of the decision and of the provider's appeal rights, as required by N.C. Gen. Stat. § 150B-23(f).

The issue addressed by the trial court in its order was whether plaintiffs had demonstrated that it would have been futile or impossible for them to seek the available administrative remedy of a contested case hearing. A provider cannot apply for a contested case hearing, however, until after (1) DHHS reaches its *final decision* on a given claim for Medicaid reimbursement, and (2) DHHS supplies the provider with written notice of its *final decision* and of the provider's appeal rights. The OAH does not obtain subject matter jurisdiction over a dispute between DHHS and a provider until the provider files a petition for a contested case hearing to review the agency's *final decision*. DHHS is the only entity involved in this matter that has the authority to reach a final decision.

The relevant statutes and NCAC regulations set out a clear schedule with deadlines that have been strictly enforced. N.C. Gen. Stat. § 150B-23(f) requires that when DHHS makes an adverse determination on a Medicaid claim, it must issue a notification to the provider that "shall be in writing, and shall set forth the agency action, and shall inform the persons of the right, the procedure, and the time limit to file a contested case petition." The 60-day deadline within which a provider must petition for a contested case hearing is triggered by the provider's receipt of the required notice of the final decision.

As a result, it is clear that a provider initiates the process of seeking an administrative remedy for a denied Medicaid claim by filing a petition seeking a contested case hearing, and that the petition is the starting point for the provider's exhaustion of administrative remedies. There is no logical or legal basis to justify grafting onto the statutory scheme a requirement imposing upon providers a new, preliminary legal obligation to remind or "nudge" DHHS into complying with its duty to render a final decision in a timely manner and to communicate its final decision to providers.

3. The presence or absence of language stating that a document is the "final notice" of DHHS' "adverse determination" is not determinative of whether the contents of the document meet the requirements of N.C. Gen. Stat. § 150B-23(f).

There is no statutory or regulatory requirement that the written notice that an agency supplies to providers pursuant to N.C. Gen. Stat. § 150B-23(f) must bear the heading "Final Notice" or similar language. The proper inquiry is not whether the document declares itself to be the notice of a final agency decision, but whether its content establishes that it is in fact such a notice.

For example, in *Glorioso v. F.B.I.*, 901 F.Supp.2d 359, 362 (E.D.N.Y. 2012), the plaintiff received a letter from a federal agency stating that "if you are dissatisfied with our decision, suit may be filed against the United States in an appropriate United States District Court, not later than six (6) months after the date of this letter." On appeal, the Court held that the letter "unequivocally informs plaintiff that, if he is dissatisfied . . . he should file suit in federal court within six months" and that "[e]ven though the letter does not include the words 'final denial,' the letter constituted notice of a final denial of the plaintiff's claim." Similarly, in *W. M. Schlosser Co. v. Fairfax County*, 17 Va. Cir. 246 (1989), the Circuit Court reviewed the appeal of a contractor attempting to pursue litigation of a contract dispute with Fairfax County, Virginia. The plaintiff conceded that he was required to appeal within six months of the County's final decision, but contended that the letter he had received was not a "final decision." Plaintiff's argument was rejected:

> First, Plaintiff claims that the April 14, 1988, letter did not state on its face that it constituted the Director's final decision. The Court does not believe that the statutory scheme of the Virginia Public Procurement Act requires a public body to emblazon the words "FINAL DECISION" across the face of a letter decision to put a party on notice that the

> appeal period has begun to run. The Court believes that the content and character of the letter in question could leave no doubt in Plaintiff's mind that the letter embodied a final decision[.]

W. M. Schlosser Co., 17 Va. Cir. at 247. In the instant case, however, the fact that the Remittance Statement does not expressly state that it is the notice of a "final agency decision" of DHHS' "adverse determination" on a Medicaid claim does not resolve the question of whether the content of the Remittance Statement establishes that it constitutes notice of a final agency decision.

4. The Remittance Statement informs a provider of DHHS' initial determination on a provider's Medicaid claim and gives a provider two options by which to challenge this initial decision. Given that DHHS' regulations expressly contemplate the possibility that DHHS may change its initial decision, the Remittance Statement cannot, as a matter of logic, itself constitute DHHS' final decision.

A provider may resubmit a denied claim within 18 months of receiving a Remittance Statement informing the provider that a claim has been denied. Defendants' Billing Guide includes detailed instructions for making suggested changes to a claim in order to correct errors in the original claim, and defendant CSC asserts in its appellee's brief that "the provider can often resolve the issue by resubmitting the claim with updated, corrected, or more complete information." Alternatively, a provider may submit a written request for an informal reconsideration review. In either case, DHHS may change its initial determination in response to the provider's argument or resubmission of the claim in dispute. Accordingly, the Remittance Statement sets forth a preliminary determination which is subject to subsequent revision. This being the case, the Remittance Statement itself cannot be DHHS' final decision on a Medicaid claim.

5. The provisions of 10A NCAC 22J .0102 are internally inconsistent and the two avenues for seeking review of a claim denial upon receipt of a Remittance Statement are legally and factually inconsistent.

10A NCAC 22J .0102(a) states in relevant part that:

> A provider may request a reconsideration review within 30 calendar days from receipt of final notification of . . . payment denial[.] . . . Final notification of payment [denial] . . . means that all administrative actions necessary to have a claim paid correctly have been taken by the provider and

> DMA or the fiscal agent has issued a final adjudication. If no request is received within the . . . [30] day period[], the state agency's action shall become final.

This regulation stipulates that a provider may seek a reconsideration review after receiving "final notification" of a DHHS action, but also that if the provider does not request a reconsideration review, then the action outlined in the Remittance Statement will at that time (30 days after the provider has received notice of the "final" decision) become final. These provisions are internally inconsistent and cannot both be accurate, because an agency decision cannot repeatedly become "final." In addition, the provider is given the option to resubmit a claim at any time within 18 months of receiving the Remittance Statement. These provisions are mutually exclusive and legally inconsistent. There is no logical way that a provider could resubmit a claim after 30 days, if the decision stated in the Remittance Statement has become final after 30 days.

6. DHHS' own procedures establish that DHHS makes its "adverse determination" or issues its "final agency action" after the earlier of (1) the expiration of 30 days after a provider's receipt of the Remittance Statement if the provider does not request a reconsideration review, at which point DHHS' initial determination becomes final, or (2) DHHS' decision about the provider's claim after a reconsideration review or resubmission of the claim. Upon making its final decision, DHHS must supply the provider with written notice of its final decision, from which a provider may seek administrative review within 60 days of receiving the written notification specified in N.C. Gen. Stat. § 150B-23(f).

For the reasons discussed above, we conclude that the Remittance Statement cannot be construed to be DHHS' final decision or adverse determination of a Medicaid claim, if for no other reason than the fact that it is expressly subject to revision. Because the Remittance Statement is sent *before* DHHS makes its final agency decision, the Remittance Statement *cannot* constitute the notice of a final decision that is required by N.C. Gen. Stat. § 150B-23(f).

7. Some of the alleged defects in the procedure by which a provider may seek review of a denied Medicaid claim might be corrected with relatively simple changes to the regulatory language and practice.

Plaintiffs' complaint alleges an array of deficiencies in the process by which a provider may challenge the denial of a Medicaid claim. Some

of the defects alleged by plaintiffs, such as problems with software, may prove difficult to resolve. Other assertions by plaintiffs, such as their allegation that Remittance Statement data is confusing, do not appear to be dispositive of the issue of plaintiffs' ability to pursue an administrative remedy. The APA, however, provides a straightforward path for review of final agency decisions. The following changes would clarify the procedures for appealing a Medicaid claim denial and bring DHHS into compliance with the APA:

> 1. The Remittance Statement, which informs providers of an interim determination that is expressly subject to revision, should state that it is an interim or tentative decision.
>
> 2. A provider who wishes to appeal the decision stated in the Remittance Statement should be required to either seek a reconsideration review within 30 days or to inform DHHS of an intention to resubmit the claim, at which point DHHS could suspend the automatic finalization of the Remittance Statement decision after 30 days.
>
> 3. Upon the earlier of (1) the expiration of 30 days during which the provider neither seeks a reconsideration review nor informs DHHS of its intention to resubmit a claim, or (2) the conclusion of the reconsideration review and/or the resubmission process, DHHS should send the provider the written notice of its final agency decision and of the provider's right to seek a contested case hearing, as required by N.C. Gen. Stat. § 150B-23(f).

E. Trial Court's Order

In its order, the trial court reviewed the law governing review of a final agency decision and made findings addressing plaintiffs' failure to exhaust administrative remedies and plaintiffs' contention that it would have been futile or impossible for them to do so. These findings, as relevant to the issues discussed herein, include the following:

. . .

> 32. Defendants contend that all of Plaintiffs' claims in this action could have been addressed and remedied through the relevant administrative procedures. These procedures provide, first, for "reconsideration review" within DHHS, followed by a contested case hearing before an administrative law judge at the Office of Administrative Hearings.

. . . Since Plaintiffs did not exhaust these administrative procedures, Defendants contend that their claims in this action must be dismissed.

33. The applicable regulations state that a "provider may request a reconsideration review within 30 calendar days from receipt of final notification of payment, payment denial, disallowances, payment adjustment, notice of program reimbursement. . . ." That section further states that "final notification . . . means that all administrative actions necessary to have a claim paid correctly have been taken by the provider and [the NC Division of Medicaid Assistance ('DMA'), a division of DHHS] or the fiscal agent has issued a final adjudication." *Id.* This process provides an opportunity for reconsideration review of any payment decision and states that "[i]f a provider disagrees with the reconsideration review decision he may request a contested case hearing." 10A NCAC 22J.0104.

. . .

36. Here, Plaintiffs admit that they did not exhaust the administrative remedies available under the DHHS regulations. . . . Instead, Plaintiffs allege that the administrative process would have been futile and inadequate to provide the relief they seek.

37. . . . Plaintiffs contend that DHHS, through its fiscal agent CSC, does not issue "final adjudications" or "final notices" that would trigger the reconsideration review and contested case processes and, consequently, Plaintiffs would be unable to obtain a "final agency decision" from which they might seek judicial review. . . .

38. Once Medicaid reimbursement claims have been submitted, providers receive Remittance Statements that notify them of Medicaid claims that have been paid and those that have been denied, and the amount for which the provider is being reimbursed for the claims submitted. . . . The Remittance Statements do not contain any language indicating that they are "final notices" or "final adjudications" of the claims. The statements themselves do not reference an appeal procedure. . . .

. . .

> 41. The Court has reviewed the Remittance Statements, regulations, and Billing Guide and concludes that they create a very confusing and difficult process for providers to determine why claims have been denied and how to appeal denials. The Remittance Statements are difficult to decipher. They do not contain any language indicating that the claims decisions contained in the statements are "final" adjudications or qualify as "final notifications," within the regulatory language set forth above. [The] regulatory language does not specify what actions are included in the phrase "all administrative actions," leaving at least some question as to whether telephone calls to the AVR and CSC Provider Services to seek assistance are "administrative actions" required before a claims decision becomes a "final adjudication." Similarly, the provision in the Billing Guide regarding certain types of appeals being excluded from the reconsideration review process is also confusing.
>
> 42. Nevertheless, at this stage Plaintiffs have only speculated that the process would be futile. Again, none of the Plaintiffs or the affiants appear to have attempted to initiate an appeal. While the regulations and Billing Guide are confusing, the regulations expressly explain an appeal process that can be initiated by making "a request for reconsideration review" within 30 days to DMA at the division's address. Even if the Remittance Statements do not clearly state that they are a "final adjudication" of the claims, at some point common sense would suggest that a provider would at least attempt to follow the appeal procedure provided for in the regulations and the Billing Code, even if simply to get a determination as to whether the Remittance Statements constituted a final adjudication.

In its order the trial court erred in several respects. For the reasons set out above, the trial court erred by treating the Remittance Statement as the notice of a final agency decision that is required by N.C. Gen. Stat. § 150B-23(f). The trial court also erred in Findings Nos. 32 and 33 by including a reconsideration review as a *mandatory* step in the process by which a provider seeks to exhaust administrative remedies prior to filing suit. The Remittance Statement acknowledges that a provider may choose to forego the reconsideration review and

resubmit a claim, or may allow the tentative determination stated in the Remittance Statement to become a final decision. In addition, the trial court made several reversible errors in Finding No. 42. The finding states that plaintiffs "have only speculated" that it would be futile for them to pursue an administrative remedy. To the contrary, plaintiffs assert that "at no time" does DHHS ever issue a final decision on a denied Medicaid claim. The trial court failed to address this issue or to determine the crucial question of fact regarding DHHS' compliance with N.C. Gen. Stat. § 150B-23(f). On remand, the trial court should make a finding as to whether DHHS ever makes a final agency decision on Medicaid claims and whether DHHS ever sends providers the notification that starts the 60-day limitation period. The trial court also erred in Finding No. 42 by suggesting that as part of exhausting administrative remedies, the plaintiffs are obligated to contact DHHS in order to urge it to comply with its own responsibilities and regulations. Finally, the court erred by ruling that plaintiffs were required to seek administrative review, in this case a contested case hearing, *not* within 60 days of receiving the notification required by N.C. Gen. Stat. § 150B-23(f) but, instead, at an undefined time when "sooner or later" plaintiffs should be guided by "common sense" to seek review.

For the reasons discussed above, we conclude that the trial court erred by failing to resolve the crucial issues of fact as to whether DHHS issues final agency decisions in Medicaid claim matters and whether DHHS supplies providers with written notice of its final agency decisions, by treating the Remittance Statement as notice of a final agency decision, by including a reconsideration review as a mandatory administrative review, by suggesting that a provider has the legal duty to ensure that DHHS complies with its own obligations, and by substituting an imprecise and subjective standard for the statutory and regulatory deadlines that apply to review of a final agency decision. The trial court's order is reversed and remanded for entry of additional findings and conclusions that apply the legal principles discussed herein. The trial court may take additional evidence if necessary. Because we are reversing the trial court's order, we do not reach plaintiffs' other arguments.

REVERSED AND REMANDED.

Judge STEPHENS concurs.

Judge McCULLOUGH dissents by separate opinion.

McCULLOUGH, Judge, dissents.

I believe that the trial court properly granted defendants' motion to dismiss based on lack of subject matter jurisdiction. I must, therefore, respectfully dissent.

As the majority stated, "[a]n action is properly dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction where the plaintiff has failed to exhaust administrative remedies." *Shell Island Homeowners Ass'n v. Tomlinson*, 134 N.C. App. 217, 220, 517 S.E.2d 406, 410 (1999). It is well-established that "where the legislature has provided by statute an effective administrative remedy, that remedy is exclusive and its relief must be exhausted before recourse may be had to the courts." *Brooks v. Southern Nat'l Corp.*, 131 N.C. App. 80, 83, 505 S.E.2d 306, 308 (1998) (citation omitted).

In the present case, it is undisputed that the NCMMIS Provider Claims and Billing Assistance Guide ("Billing Guide"), available to all Medicaid-eligible care providers, summarizes the appeal procedure set forth in 10A N.C.A.C. 22J.0102-0105. The Billing Guide also states that appeals should be directed to the DMA Appeals Unit, Clinic Policy and Programs, and provides a mailing address located in Raleigh, North Carolina. The trial court found and agreed with plaintiffs that the Remittance Statements, regulations, and Billing Guide "create a very confusing and difficult process for providers to determine why claims have been denied and how to appeal denials."

However, none of the plaintiffs has attempted to initiate an appeal and has only speculated that the administrative process would be futile and inadequate. The trial court discussed, and plaintiffs do not challenge the validity of its discussion, that while the regulations and Billing Guide may be confusing, they

> expressly explain an appeal process that can be initiated by making "a request for reconsideration review" within 30 days to DMA at the division's address. Even if the Remittance Statements do not clearly state that they are a "final adjudications" of the claims, at some point common sense would suggest that a provider would at least attempt to follow the appeal procedure provided for in the regulations and the Billing Guide, even if simply to get a determination as to whether the Remittance Statements constituted a final adjudication.

In addition, the trial court found that the process for seeking review of Medicaid claims decisions "did not change with the implementation of NCTracks, but, rather, has apparently been in place for some time." I agree with the trial court's discussion, and thus, would reject plaintiffs' arguments that because DHHS failed to follow the procedures set forth in the North Carolina Administrative Code for reconsideration review, plaintiffs were excused from exhausting their administrative remedies. Our Court has made it clear that "futility cannot be established by plaintiffs' prediction or anticipation that [DHHS] would again rule adversely to plaintiffs' interests." *Affordable Care, Inc. v. N.C. State Bd. of Dental Examiners.*, 153 N.C. App. 527, 534, 571 S.E.2d 52, 58 (2002).

Furthermore, I agree with the trial court that plaintiffs failed to satisfy their burden of proving that the administrative remedies were inadequate to resolve their claims. Our Court has previously held that "[w]here the remedy established by the APA is inadequate, exhaustion is not required. The remedy is considered inadequate unless it is calculated to give relief more or less commensurate with the claim." *Shell Island*, 134 N.C. App. at 222-23, 517 S.E.2d at 411 (citations and quotation marks omitted).

In accordance with the reasoning set forth in *Jackson v. N.C. Dep't of Human Resources*, 131 N.C. App. 179, 505 S.E.2d 899 (1998), I believe that a thorough review of the record reveals that plaintiffs' primary claim is for unpaid Medicaid reimbursement claims. This is the exact type of claim that should be determined by DHHS' administrative procedures. As to plaintiffs' claims for breach of contract and a violation of the North Carolina Constitution instituted against DHHS, in which plaintiffs seek damages for the payment of improperly denied Medicaid reimbursement claims, I believe that DHHS' administrative review and appeal process could have given plaintiffs relief "more or less commensurate with [plaintiffs'] claim" and that the trial court did not err by dismissing these claims. As to plaintiffs' claim for a declaratory judgment that DHHS' payment methodology, effective 1 July 2013, violated Medicaid reimbursement rules, plaintiffs were required to first seek a declaratory ruling from DHHS before bringing a claim to the courts. N.C. Gen. Stat. § 150B-4 provides a method for a party in plaintiffs' position seeking a declaratory ruling with the agency:

> On request of a person aggrieved, an agency shall issue a declaratory ruling as to the validity of a rule or as to the applicability to a given state of facts of a statute administered by the agency or of a rule or order of the agency.

> Upon request, an agency shall also issue a declaratory ruling to resolve a conflict or inconsistency within the agency regarding an interpretation of the law or a rule adopted by the agency.

N.C. Gen. Stat. § 150B-4(a) (2015). Finally, as to plaintiffs' claims of negligence and UDTP against CSC, a review of plaintiffs' amended complaint demonstrates that plaintiffs seek reimbursement for Medicaid claims that were improperly denied because of CSC's alleged negligent design, implementation, and administration of NCTracks and for related business damages resulting from the improperly denied claims. The administrative remedies available to plaintiffs could have provided plaintiffs relief more or less commensurate with plaintiffs' claims. Accordingly, I believe that plaintiffs are not relieved from the requirement that they exhaust available administrative remedies before resorting to the courts.

Based on the foregoing reasons, I would affirm the 12 June 2015 order of the trial court, dismissing plaintiffs' complaint for lack of subject matter jurisdiction.

DENISE CHAFIN, Plaintiff
v.
STEPHEN CHAFIN, Defendant

No. COA15-1152

Filed 18 October 2016

1. Appeal and Error—preservation of issues—equitable distribution

Although defendant husband contended that the trial court lacked jurisdiction in an equitable distribution case to distribute the Bank of America checking account, vehicles, and cash on hand since Rush Auto held legal title to these assets and was not joined as a party to the action, this argument was not preserved. Defendant raised this argument for the first time on appeal and without evidentiary support.

2. Divorce—equitable distribution—valuation—business interest—reasonable estimate

The trial court did not err in an equitable distribution case by distributing Rush Auto to defendant husband without assigning a

value to the business interest. While the trial court distributed Rush Auto without explicitly valuing the company, the findings ultimately reflected a reasonable estimate of the parties' interest.

3. Divorce—equitable distribution—marital property valuation —vehicles

The trial court did not err in an equitable distribution case by finding that the vehicles were marital property worth $36,350.00. The record showed that the trial court allowed defendant's motion to preserve the record with excluded evidence and testimony, and that it ultimately considered the evidence.

4. Divorce—equitable distribution—ability to pay

The trial court did not abuse its discretion in an equitable distribution case by allegedly failing to consider defendant's ability to pay. The trial court specifically found that defendant was employed and had adequate assets and income from said employment to pay the distributive award.

5. Divorce—equitable distribution—findings of fact—distribution of marital debt

The trial court did not abuse its discretion in an equitable distribution case by making finding number 14. The evidence supported the trial court's finding that the parties stipulated to the distribution of the marital debt to plaintiff.

6. Pleadings—Rule 11 sanctions—attempt to delay hearing

A de novo review revealed that the trial court did not err in an equitable distribution case by ordering Rule 11 sanctions against defendant husband. There was sufficient evidence in the record to support the trial court's finding that defendant filed the challenged motions in an attempt to delay the hearing.

Appeal by defendant from judgment and orders entered 6 November 2014 by Judge Teresa H. Vincent in Guilford County District Court. Heard in the Court of Appeals 10 August 2016.

Woodruff Family Law Group, by Jessica S. Bullock and Adam D. Furr, for plaintiff-appellee.

Barry Snyder for defendant-appellant.

ELMORE, Judge.

After five years of litigation involving six different attorneys and abounding motions, the trial court ordered an equitable distribution of the parties' marital and divisible property. Defendant appeals, challenging the distribution of former company property and marital debt, his ability to pay a distributive award, and the trial court's order for sanctions. We affirm.

I. Background

Denise Chafin (plaintiff) and Stephen Chafin (defendant) were married on 20 December 1988 and separated on 12 June 2008. During the marriage, defendant started a used car dealership, I Rush Auto Sales, LLC (Rush Auto), which sold mid- to low-end used cars purchased through a wholesaler known as Manheim. The Articles of Organization were filed 12 February 2007, naming defendant and his business partner, Peter Ault, as organizers. Their venture was short-lived. Mr. Ault was later removed as a member and replaced by defendant's father, Robert Chafin. The company continued to operate through the date of separation until it was administratively dissolved on 8 August 2008.

On 14 May 2009, plaintiff filed a complaint seeking, *inter alia*, an equitable distribution of the marital and divisible property. Pursuant to a pretrial scheduling order, plaintiff served her initial equitable distribution inventory affidavit on 29 July 2010, followed by a second inventory affidavit attached and incorporated into her proposed pretrial order on 24 October 2011. In both affidavits, plaintiff listed the business interest in Rush Auto, valued at $10,000.00, and its associated bank accounts as marital property to be distributed to defendant. She filed an amended preliminary equitable distribution affidavit on 7 March 2012, this time including an itemized list of nine vehicles which plaintiff claimed were owned by Rush Auto on the date of separation.

Upon additional discovery, plaintiff submitted her final inventory affidavit on 10 April 2013, listing the following in "Schedule C Business or Professional Interests":

C1	I Rush Auto Sales, LLC	. . .	[No Value]
C1(a)	I Rush Auto Sales, LLC Bank of America Checking Account Account Number ending in -3001	. . .	$11,110.13
C1(b)	I Rush Auto Sales, LLC Inventory (Vehicles)	. . .	$50,825.00

. . . .

C1(d)	I Rush Auto Sales, LLC Cash on Hand	. . .	$4,218.16
C1(e)	I Rush Auto Sales, LLC SunTrust Checking Account Account Number ending in -8407	. . .	$1,782.56
C1(f)	I Rush Auto Sales, LLC SunTrust Checking Account Account Number ending in -9050	. . .	TBD

Plaintiff alleged that each item was marital property, in possession of defendant, and should be distributed to defendant.

The trial court ordered defendant to serve his equitable distribution inventory affidavit and to fill in his contentions on the pretrial order, but he failed to do so. He did serve an "affidavit in response to the proposed pretrial order" on 30 May 2013, the day before the hearing on the pretrial order. As later described by the court, however, defendant's affidavit "utterly ignored the Guilford County Local Rules with regard to equitable distribution" and "[did] not comply with pretrial order form required by the Guilford County Local Rules."

At the hearing, the parties agreed to entry of the pretrial order with the understanding that plaintiff would amend the inventory schedules to reflect defendant's contentions. In his affidavit, defendant objected to plaintiff's classification of the business interests on the following grounds:

> Schedule C: Business or Professional Interests
>
> C1 Husband valued I Rush Auto Sales, LLC at -0- dollars.
>
> C1(a) Although bank account for Rush Auto may indicate deposits totaling $11,110.13 the debt service would at least equal this amount.
>
> C1(b) The inventory of vehicles amount [sic] does not take into account the value less any loans against the vehicles, that is, $50,825.00 does not represent the equity in the vehicles.
>
> . . . .
>
> C1(d) The amount of "cash on hand" represents the amount of money for which, at the point calculated, debts of the business had not been paid or taken into account.

> C1(e) The amount of funds in the Rush Auto banking account 8407 of $1,782.56 was owned by Pete Ault and is not part of the funds of Husband.
>
> C2(f) The amount of funds in the Rush Auto banking account 9050 which is "TBD" is not known nor recognized by Husband.

Defendant also agreed that "if anything new comes up at [plaintiff's] deposition," scheduled for June 2013, then "it will just be added onto whatever that file [sic] pretrial order may be."

After several continuances, the trial was peremptorily set for 9 and 10 January 2014. On 13 January 2014, after the trial had begun, defendant filed a series of motions, including a motion to amend the pretrial order, a motion to preserve the record with excluded evidence and testimony, a motion to continue the trial, and three months later, a motion to set aside the pretrial order. The trial court denied defendant's motions, but did eventually allow his motion to preserve the record in which defendant offered evidence to show that not all vehicles listed in the pretrial order were on the Rush Auto lot on the date of separation.

On 6 November 2014, the trial court entered its equitable distribution order, in which it made the following findings and conclusions relevant to defendant's appeal:

> 8. With regard to the items on Schedule C, the Court finds and orders the following:
>
> a. Item Cl, I Rush Auto Sales, LLC, is a marital asset distributed to the Defendant, but due to insufficient evidence, the Court cannot make a determination as to value.
>
> b. Item CI(a), I Rush Auto Sales, LLC Bank of America Checking Account, account number ending in -3001, is a marital asset distributed to the Defendant at a value of $11,110.13. Defendant failed to provide sufficient proof that the funds in the account were encumbered.
>
> c. Item C1(b), I Rush Auto Sales, LLC Inventory (Vehicles), is a marital asset distributed to the Defendant at a value of $36,350.00. This amount reflects the price Defendant paid for the vehicles that were on the car lot on the date of separation. Plaintiff completed an inventory of the vehicles on the car lot on the date of separation. Defendant's Manheim registry, which is a list of the vehicles purchased

via the Manheim Finance Company, dated on or about the date of separation, is consistent with the models described by Plaintiff. However, there was insufficient evidence that Defendant was able to sell the vehicles for a profit. In fact, Defendant's business was unprofitable and therefore closed down.

. . . .

e. Item CI(d), I Rush Auto Sales, LLC Cash on Hand, is a marital asset distributed to the Defendant at a value of $4,218.16.

f. Item Cl(e), I Rush Auto Sales, LLC SunTrust Checking Account, account number ending in -8407, had a date of separation value of $1,782.56, but when the Defendant and his partner dissolved the business, Defendant left the funds in the account and Defendant's partner took possession of the funds.

. . . .

14. With regard to the items on Schedule H, the Court finds and orders the following:

h. Item H8, HFC Judgment (formerly Household Realty), is a marital debt distributed to the Plaintiff at a value of ($19,419.92). This amount represented a civil judgment that appeared as a lien on the marital home and had to be paid at closing in order to sell the marital home. Although, this debt is associated with the mortgage and the Court would normally distribute it to the same party being distributed the marital home, the parties stipulated that it would be distributed to Plaintiff.

. . . .

23. In order to effectuate the equitable distribution of the marital estate ordered herein, the Defendant shall pay a distributive award to the Plaintiff in the amount of $89,385.44 at the rate of $550.00 per month beginning November 1, 2014 and continuing on the first of each month thereafter until the balance is paid in full. The above distributive award is related to the cessation of the marriage.

24. The Court finds that Defendant is presently employed and has adequate assets and income from said employment

> such that Defendant has the ability to pay the distributive award as set forth herein.

The trial court also allowed plaintiff's motion for sanctions pursuant to Rule 11 and N.C. Gen. Stat. § 50-21(e). The court ordered defendant to pay $10,000.00 in attorney's fees based on its conclusions that defendant and his counsel unreasonably delayed the proceedings through "defendant's numerous and frivolous motions, defendant's discovery 'tactics,' and most recently defendant's abuse of the pretrial order process." Defendant filed notice of appeal on 5 December 2014 from the judgment and order of equitable distribution and the order for sanctions.

II. Discussion

Our review is governed by the following principles of equitable distribution:

> Upon application of a party for an equitable distribution, the trial court "shall determine what is the marital property and shall provide for an equitable distribution of the marital property . . . in accordance with the provisions of [N.C. Gen. Stat. § 50-20]." In so doing, the court must conduct a three-step analysis. First, the court must identify and classify all property as marital or separate based upon the evidence presented regarding the nature of the asset. Second, the court must determine the net value of the marital property as of the date of the parties' separation, with net value being market value, if any, less the amount of any encumbrances. Third, the court must distribute the marital property in an equitable manner.

Smith v. Smith, 111 N.C. App. 460, 470, 433 S.E.2d 196, 202–03 (1993) (citations omitted) (quoting N.C. Gen. Stat. § 50-20), *rev'd in part on other grounds*, 336 N.C. 575, 444 S.E.2d 420 (1994).

> Equitable distribution is vested in the discretion of the trial court and will not be disturbed absent a clear abuse of that discretion. Only a finding that the judgment was unsupported by reason and could not have been a result of competent inquiry, or a finding that the trial judge failed to comply with the statute, will establish an abuse of discretion.

Wiencek-Adams v. Adams, 331 N.C. 688, 691, 417 S.E.2d 449, 451 (1992) (citations omitted).

A. Distribution of Checking Account, Vehicles, and Cash on Hand

[1] Defendant first argues that the trial court lacked jurisdiction to distribute the Bank of America checking account, vehicles, and cash on hand, because Rush Auto held legal title to these assets and was not joined as a party to the action.

Defendant raises this argument for the first time on appeal and without evidentiary support. At no point during this action did he object to plaintiff's classification of these items as marital property: In his responsive affidavit, he contests only the value of each of these items. In his motions to amend and to preserve the record, he challenges plaintiff's evidence as to which vehicles were on the Rush Auto lot on the date of separation. And in his motion to set aside the pretrial order, he actually concedes that any vehicle on the Rush Auto lot on the date of separation would be marital property. Defendant has therefore failed to preserve this argument for appellate review. *See Quesinberry v. Quesinberry*, 210 N.C. App. 578, 581–83, 709 S.E.2d 367, 371–72 (2011) (rejecting husband's argument that the trial court lacked jurisdiction to distribute assets he claimed belonged to business where he made no prior objection and stipulated that assets were marital property); *see also Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934) ("[T]he law does not permit parties to swap horses between courts in order to get a better mount . . . ."); N.C. R. App. P. 10(a)(1) (2016) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion . . . ."). And as discussed in Part B, *infra*, the evidence ultimately supports the trial court's findings that the business interest, checking account, vehicles, and cash on hand, are marital property.

B. Business Interest in Rush Auto

[2] In the alternative, defendant argues that if the trial court had jurisdiction, it nevertheless erred in distributing Rush Auto to defendant without assigning a value to the business interest.

"In an equitable distribution proceeding, the trial court is to determine the net fair market value of the property based on the evidence offered by the parties." *Walter v. Walter*, 149 N.C. App. 723, 733, 561 S.E.2d 571, 577 (2002) (footnote and citations omitted); *see also* N.C. Gen. Stat. § 50-20(c) (2015) ("There shall be an equal division by using net value of marital property and net value of divisible property . . . ."). "In valuing a marital interest in a business, the task of the trial court is to arrive at a date of separation value which 'reasonably approximates' the net value of the business interest." *Offerman v. Offerman*, 137 N.C. App. 289, 292,

527 S.E.2d 684, 686 (2000) (quoting *Poore v. Poore*, 75 N.C. App. 414, 422, 331 S.E.2d 266, 272 (1985)).

Rush Auto was organized during the marriage and still operating on the date of separation, making any business interest in the company marital property—as found by the trial court. *See* N.C. Gen. Stat. § 50-20(b)(1) (2015); *see also* N.C. Gen. Stat. § 57D-5-01 (2015) ("An ownership interest is personal property."); *Hill v. Hill*, 229 N.C. App. 511, 518, 748 S.E.2d 352, 358 (2013) ("If the corporation was created during the marriage, and it was owned and operated by the parties, it is a marital asset regardless of the stock ownership." (citation omitted)). Specific assets of an LLC, on the other hand, are owned by the entity and are not the property of the interest owners. *See* N.C. Gen. Stat. § 57D-2-01(a) (2015) ("An LLC is an entity distinct from its interest owners"); *see also* N.C. Gen. Stat. §§ 57D-4-01, -5-05, -6-04(c)(1), -6-08 (2015). Although Rush Auto was dissolved after the date of separation, defendant correctly notes that dissolution alone does not transfer title to the company's assets. N.C. Gen. Stat. § 57D-6-07(e) (2015).

By virtue of the business interest, however, defendant was entitled to a distribution of the remaining assets after dissolution and during the winding up of the company's affairs. *See* N.C. Gen. Stat. § 57D-4-03 (2015) (describing manner of "[d]istributions to interest owners before the dissolution and winding up of the LLC or, as provided in G.S. 57D-6-08(2), after the dissolution of the LLC"); N.C. Gen. Stat. § 57D-6-08 ("During the winding up of an LLC, the LLC's assets are to be applied . . . [f]irst to creditors, . . . [t]he balance to interest owners as distributions . . . ."); *see also Hill*, 229 N.C. App. at 518–19, 748 S.E.2d at 358 (holding that to the extent corporation was marital asset, post-separation distributions were marital property). This much is reflected in the trial court's equitable distribution order: In particular, the court found that the Bank of America checking account, vehicles, and cash on hand, were marital property; Rush Auto was unprofitable and therefore closed down; after dissolving the company, defendant's business partner took possession of the funds in the SunTrust account; and defendant failed to prove that the Bank of America checking account was encumbered.

While the trial court distributed Rush Auto without explicitly valuing the company, the findings ultimately reflect a reasonable estimate of the parties' interest. In plaintiff's initial inventory affidavits, she assigned a $10,000.00 valuation to the business based primarily on its inventory. As additional assets were revealed through discovery, she listed them separately under the Rush Auto business interest, valuing each item individually and leaving blank the value of the company. The record

shows no other former company property at stake, leading further to the conclusion that any interest in the dissolved company is represented by the aggregate value of the checking account, inventory, cash on hand, accounts payable, and accounts receivable—all of which were distributed to defendant. *See Poore*, 75 N.C. App. at 419, 331 S.E.2d at 270 (instructing courts to consider the following components in valuation of a business: "(a) its fixed assets including cash, furniture, equipment, and other supplies; (b) its other assets including accounts receivable and the value of work in progress; (c) its goodwill, if any; and (d) its liabilities"). If there was an error in the distribution of Rush Auto, therefore, it was the trial court's decision to itemize the assets separately from the interest in the company. *See* 1 Brett R. Turner, *Equitable Distribution of Property* § 5:16, at 311 (3d ed. 2005) ("[T]he value of the corporate assets is included in the value of the corporation's stock, and any stock owned by the parties would of course be marital property."). Accordingly, we see no reason to remand and extend this action any longer.

C. Classification and Value of Vehicles

[3] Next, defendant challenges the trial court's finding that the vehicles are marital property worth $36,350.00. Specifically, defendant contends that there is no competent evidence that the nine vehicles listed in plaintiff's affidavit were "presently owned" on the date of separation.

"In appellate review of a bench equitable distribution trial, the findings of fact regarding value are conclusive if there is evidence to support them." *Crutchfield v. Crutchfield*, 132 N.C. App. 193, 197, 511 S.E.2d 31, 34 (1999) (citing *Chandler v. Chandler*, 108 N.C. App. 66, 73, 422 S.E.2d 587, 592 (1992)). " 'This Court is not here to second-guess values of marital and separate property where there is evidence to support the trial court's figures.' " *Id.* (quoting *Mishler v. Mishler*, 90 N.C. App. 72, 74, 367 S.E.2d 385, 386 (1988)).

In plaintiff's amended preliminary equitable distribution affidavit, she listed the make, model, year, and value for each of the nine vehicles claimed to be marital property. Plaintiff testified during a deposition that she visited the Rush Auto lot with defendant on the date of separation and took note of which vehicles had not been sold. Upon comparison with Rush Auto's vehicle registry, the vehicles listed by plaintiff are consistent with those purchased by the company from Manheim before the date of separation.

Plaintiff also testified that she valued each of the vehicles by consulting the National Automobile Dealers Association. She arrived at a total date of separation value of $52,825.00, as shown in the inventory

affidavit submitted with her proposed pretrial order and the schedules attached to the pretrial order. In the trial court's equitable distribution order, however, it valued the vehicles at $36,350.00 to reflect the price paid by Rush Auto for the vehicles, evidenced by checks written to Manheim, because "there was insufficient evidence that Defendant was able to sell the vehicles for a profit." Based on the foregoing, the trial court's classification and valuation of the vehicles are supported by competent evidence.

Relatedly, defendant argues that the court improperly denied him the opportunity to offer evidence of which vehicles were on the Rush Auto lot on the date of separation. In defendant's response to the pretrial order, he raised only one objection to the vehicles: "The inventory of vehicles amount [sic] does not take into account the value less any loans against the vehicles, that is, $50,825.00 does not represent the equity in the vehicles." Because defendant had an opportunity to contest the accuracy of the inventory but failed to do so until after the trial had begun, the court did not abuse its discretion in denying defendant's request to offer evidence. In any event, the record shows the trial court allowed defendant's motion to preserve the record with excluded evidence and testimony, and that it ultimately considered the evidence in its order for equitable distribution.

D. Ability to Pay Distributive Award

[4] Next, defendant argues that the trial court abused its discretion by ordering a distributive award without considering defendant's ability to pay. In its equitable distribution order, the trial court specifically found "that Defendant is presently employed and has adequate assets and income from said employment such that Defendant has the ability to pay the distributive award as set forth herein." Because this finding is also supported by competent evidence showing that defendant has sufficient liquid assets to pay the award, we reject defendant's argument. *See Allen v. Allen*, 168 N.C. App. 368, 376–77, 607 S.E.2d 331, 336–37 (2005).

E. Stipulation as to HFC Judgment

[5] Next, defendant argues that there is no evidence to support the trial court's Finding of Fact No. 14(h), in which the court found that the parties stipulated to the distribution of the HFC Judgment to plaintiff.

Along with plaintiff's contentions for an unequal division, the HFC Judgment appears in plaintiff's final equitable distribution inventory affidavit and the schedules to the pretrial order. In defendant's response to the proposed pretrial order, he appears to contest plaintiff's

accusation that the $19,000.00 debt was attributable to necessary repairs to the marital home after defendant allowed the home to deteriorate. But apart from shifting blame for the debt or vaguely objecting to its value, defendant did not contest that the HFC Judgment was a marital debt that should be distributed to plaintiff. In light of this evidence and defendant's "abuse of the pretrial order process," we cannot accept defendant's argument that the stipulation resulted in an admission of a fact which clearly was intended to be controverted. *See Rickert v. Rickert*, 282 N.C. 373, 380, 193 S.E.2d 79, 83 (1972) (citations omitted). The evidence supports the trial court's finding that the parties stipulated to the distribution of the marital debt to plaintiff.

F. Rule 11 Sanctions

[6] Finally, defendant challenges the trial court's order for Rule 11 sanctions. In cursory fashion, defendant contends that "not every finding of fact and law can be addressed in this brief but all are contested and denied." Because he offers no reason or argument to support his broad contentions, they are deemed abandoned. N.C. R. App. P. 28(b)(6) (2016). In defendant's only developed argument, he defends his decision to file motions to amend and to set aside the pretrial order, which were a fraction of the grounds supporting the trial court's nine-page order for sanctions. Defendant nevertheless maintains that these motions were filed in good faith and "to prevent manifest injustice."

We review *de novo* the trial court's decision to impose mandatory sanctions pursuant to N.C. Gen. Stat. § 1A-1, Rule 11(a) (2015).

> In the *de novo* review, the appellate court will determine (1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence. If the appellate court makes these three determinations in the affirmative, it must uphold the trial court's decision to impose or deny the imposition of mandatory sanctions under N.C.G.S. § 1A-1, Rule 11(a).

Turner v. Duke Univ., 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989).

There is sufficient evidence in the record to support the trial court's finding that defendant filed the challenged motions in an attempt to delay the hearing of this equitable distribution matter. Contrary to defendant's assertion, he had more than ample opportunity to refute

plaintiff's evidence concerning the inventory of the vehicles. He failed to do so during the pretrial order process, at the pretrial order hearing, or within a reasonable time after plaintiff's deposition. Instead, defendant elected to file his motions after the equitable distribution hearing had begun and without prior notice to plaintiff. Because the sufficiency of the evidence supports the findings, the findings the conclusions, and the conclusions the judgment, the trial court properly ordered Rule 11 sanctions against defendant.

III. Conclusion

Based on the foregoing, we affirm the trial court's judgment and order of equitable distribution and its order for sanctions.

AFFIRMED.

Judges DAVIS and DIETZ concur.

JASON FULLWOOD, Plaintiff
v.
SHON F. BARNES, Individually and in his Official Capacity, Defendant

No. COA16-357

Filed 18 October 2016

1. Appeal and Error—interlocutory orders and appeals—denial of motion for summary judgment—substantial right—governmental and public official immunity

Although the denial of a motion for summary judgment is generally a nonappealable interlocutory order, orders denying dispositive motions based on the defenses of governmental and public official immunity affect a substantial right and are immediately appealable.

2. Immunity—governmental immunity—official capacity—failure to allege waiver

The trial court erred by denying defendant police officer's motion for summary judgment on the affirmative defense of governmental immunity for plaintiff's claims in his official capacity. Plaintiff failed to allege waiver of this affirmative defense.

3. Immunity—public official immunity—individual capacity—malice

The trial court did not err by denying defendant police officer's motion for summary judgment on the affirmative defense of public official immunity concerning plaintiff's tort claims against defendant in his individual capacity. Plaintiff's complaint and affidavit forecasted triable issues of fact that existed on whether defendant's actions were improperly motivated by malice.

Appeal by defendant from order entered 9 October 2015 by Judge Anderson D. Cromer in Guilford County Superior Court. Heard in the Court of Appeals 21 September 2016.

Smith, James, Rowlett & Cohen, LLP, by Norman B. Smith, for plaintiff-appellee.

Office of the City Attorney, by James A. Clark and Marion J. Williams, certified legal intern pursuant to 27 N.C.A.C. 1C.0207, for defendant-appellant.

TYSON, Judge.

Shon F. Barnes (Shawn F. Barnes) ("Defendant") appeals from order denying his motion for summary judgment. We affirm in part, reverse in part, and remand.

I. Factual Background

Greensboro Police Department Captain Shon F. Barnes arrested Plaintiff on 31 January 2014 for felony possession and intent to sell and deliver cocaine, maintaining dwelling for controlled substances, and possession of drug paraphernalia. Plaintiff's arrest occurred after a raid of premises located at 310 West Meadowview Street ("Heritage House"), a privately-owned, multi-unit apartment building. More than thirty individuals owned, maintained, and rented their respective apartments in Heritage House. The common areas were maintained by a homeowner's association ("HOA"). Plaintiff's father owned twenty units located within Heritage House, which Plaintiff managed. Plaintiff maintained an office on the third floor of Heritage House and visited the property on a regular basis.

The Greensboro Police Department ("GDP") designated the neighborhood surrounding Heritage House to be a "district crime priority, with

drug sales and social disorder as the underlying cause of the problem." This designation was implemented after 865 calls for police response concerning incidents occurring near Heritage House were received within one year. Many of these calls involved illegal drug sales.

GDP officers met with Heritage House unit owners upon multiple occasions and requested the owners consider changing their rental policies to reduce crime. Landlords were asked to submit a list of their tenants to the HOA. The GDP also requested that homeowners require all adult guests and visitors to present photo identification at the front desk or when they were approached by a police officer on the grounds. Plaintiff was present for at least one of these meetings.

On 31 January 2014, the GDP conducted a raid on Heritage House involving approximately 65 law enforcement officers and executed search warrants on five different units, including unit 308 managed by Plaintiff. Plaintiff arrived at the unit shortly after the raid began. The search of unit 308 yielded 25 dosage units of crack cocaine, various drug paraphernalia, and a significant quantity of cash found inside a hat. None of these items were tied or connected directly to Plaintiff.

No one was present inside unit 308 at the time the search occurred and the unit was found to be in uninhabitable condition. Another officer informed Defendant the unit was vacant. Defendant questioned Plaintiff about unit 308 prior to arresting him. Defendant's affidavit stated Plaintiff never informed Defendant that documents showing the identity of the renter of unit 308 were available and Plaintiff was unable to name any tenant or occupant living there.

A. Defendant's Affidavit

Defendant's affidavit stated he was aware of Plaintiff's previous convictions for drug related offenses, and that Plaintiff had failed to make good faith efforts to stop the use of his father's units for drug dealing and prostitution. Defendant also believed Plaintiff was personally engaged in drug activity and was a member of the Bloods criminal gang. Defendant alleged his belief upon Plaintiff's tendency to wear red and black clothing, indicative of membership in the Bloods. Defendant also alleged that North Carolina Department of Corrections ("DOC") records indicated DOC personnel had confirmed Plaintiff's membership in the Bloods gang, while Defendant was incarcerated. Defendant also asserted Plaintiff had previously impeded police officers by intervening on behalf of tenants occupying his units, and by refusing to cooperate with officers or by providing information concerning criminal investigations.

Based upon his previous knowledge of Plaintiff and the results of the search and seizure of contraband from unit 308, Defendant instructed an officer to call the magistrate and request a finding of probable cause to arrest Plaintiff. The magistrate found probable cause and issued an order for Plaintiff's arrest. Plaintiff was handcuffed and transported to the Guilford County Jail. Defendant's affidavit claims Plaintiff was cooperative and no force was needed to detain or arrest him.

B. Plaintiff's Affidavit

Plaintiff denies many of the statements contained in Defendant's affidavits. Plaintiff submitted an affidavit to deny Defendant's allegations and to "correct some of the false statements" made in the Defendant's affidavits. In particular, Plaintiff alleges he possessed lease records for unit 308 and offered to retrieve them for Defendant when he was questioned about tenants of the unit, but Defendant had refused Plaintiff's request to retrieve that information.

Plaintiff also denied statements in both the HOA's president's and landlord's affidavits, which asserted Plaintiff was "always in a hurry to go upstairs" and appeared to be sneaking into the building. Plaintiff counters he had no reason to sneak into the building and was present at Heritage House between four and five times a week to manage the twenty units his father owned.

Plaintiff's affidavit claims he cooperated with the HOA's requests to provide a complete tenant list, and had worked to make Heritage House "a better place." Plaintiff felt harassed by police officers, who patrolled Heritage House. Plaintiff was constantly required to present photo identification, even though the officers knew his identity and that he managed several of the Heritage House units. Plaintiff asserted he was not concerned about being searched by officers patrolling Heritage House, but believed on several occasions the officers would have attempted to search him in violation of his rights. He tried to limit his engagements with the officers.

Plaintiff denies any affiliation with gang activity. Plaintiff states he never wore gang colors or insignias. While incarcerated by the DOC, he never was accused of or participated in any gang activity.

Plaintiff also asserts the magistrate appeared unwilling to issue a criminal warrant when Plaintiff was brought before him for the criminal charges at issue. The magistrate questioned the GPD officers on "whether this was the right thing to do" since Plaintiff only managed the apartment and was not either the owner or the tenant of unit 308.

The charges against Plaintiff were ultimately dismissed by the Guilford County District Attorney on 16 September 2014. On 21 January 2015, Plaintiff filed this complaint against Defendant. Plaintiff asserted claims against Defendant, in both his official and individual capacities, for the following: (1) assault and battery, (2) false arrest and false imprisonment, and (3) malicious prosecution. Plaintiff sought punitive damages for all three claims "[b]ecause defendant acted with actual malice in the sense of personal ill will, and acted with conscious and intentional disregard to plaintiff's rights, which he knew was reasonably likely to result in injury."

On 24 February 2015, Defendant answered Plaintiff's complaint and filed a Rule 12(b)(6) motion to dismiss. Defendant alleged he was entitled to the defenses of governmental immunity, public official immunity, necessity, and probable cause. Defendant filed a subsequent motion for summary judgment on 8 September 2015.

The trial court heard Defendant's motion for summary judgment in October 2015. Prior to ruling, the trial court considered six affidavits, the pleadings, legal authority submitted by each party, and arguments of counsel. The trial court concluded Defendant's motion for summary judgment "should be denied as there are genuine issues of material fact and [defendant is] not entitled to judgment as a matter of law." Defendant appeals.

II. Issues

Defendant argues the trial court erred by denying his motion for summary judgment asserting affirmative defenses of governmental immunity and public official immunity.

III. Standard of Review

Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A–1, Rule 56(c) (2015); *see Draughon v. Harnett Cnty. Bd. of Educ.*, 158 N.C. App. 208, 212, 580 S.E.2d 732, 735 (2003) (citation omitted), *aff'd per curium*, 358 N.C. 131, 591 S.E.2d 521 (2004).

In reviewing a motion for summary judgment, the trial court must "view the pleadings and all other evidence in the record in the light most favorable to the nonmovant and draw all reasonable inferences in that party's favor." *N.C. Farm Bureau Mut. Ins. Co. v. Sadler*, 365 N.C. 178, 182, 711 S.E.2d 114, 117 (2011) (citation omitted).

> An issue is "genuine" if it can be proven by substantial evidence and a fact is "material" if it would constitute or irrevocably establish any material element of a claim or a defense.
>
> A party moving for summary judgment may prevail if it meets the burden (1) of proving an essential element of the opposing party's claim is nonexistent, or (2) of showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim. Generally this means that on undisputed aspects of the opposing evidential forecast, where there is no genuine issue of fact, the moving party is entitled to judgment as a matter of law. If the moving party meets this burden, the non-moving party must in turn either show that a genuine issue of material fact exists for trial or must provide an excuse for not doing so.

Lowe v. Bradford, 305 N.C. 366, 369, 289 S.E.2d 363, 366 (1982) (citations and internal quotation marks omitted). This Court reviews a trial court's summary judgment order *de novo*. *Sturgill v. Ashe Mem'l Hosp., Inc.*, 186 N.C. App. 624, 626, 652 S.E.2d 302, 304 (2007), *disc. review denied*, 362 N.C. 180, 658 S.E.2d 662 (2008).

IV. Analysis

A. Jurisdiction

[1] Generally, "the denial of a motion for summary judgment is a non-appealable interlocutory order." *Northwestern Fin. Grp. v. Cnty. of Gaston*, 110 N.C. App. 531, 535, 430 S.E.2d 689, 692 (citation omitted), *disc. review denied*, 334 N.C. 621, 435 S.E.2d 337 (1993). This Court will only address the merits of such an appeal if "a substantial right of one of the parties would be lost if the appeal were not heard prior to the final judgment." *Id.*

Well-settled precedents hold "[o]rders denying dispositive motions based on the defenses of governmental and public official's immunity affect a substantial right and are immediately appealable." *Thompson v. Town of Dallas*, 142 N.C. App. 651, 653, 543 S.E.2d 901, 903 (2001) (citing *Corum v. Univ. of North Carolina*, 97 N.C. App. 527, 389 S.E.2d 596 (1990)), *aff'd in part, reversed in part, and remanded*, 330 N.C. 761, 413 S.E.2d 276, *reh'g denied*, 331 N.C. 558, 418 S.E.2d 664 (1992). This Court allows interlocutory appeals of orders denying motions based on these defenses because "the essence of absolute immunity is its possessor's

entitlement not to have to answer for his conduct in a civil damages action." *Epps v. Duke Univ., Inc.*, 122 N.C. App. 198, 201, 468 S.E.2d 846, 849 (citations and internal quotation marks omitted), *disc. review denied*, 344 N.C. 436, 476 S.E.2d 115 (1996). Defendant's appeal is properly before this Court. *Id.*

B. Governmental Immunity

[2] "In North Carolina, governmental immunity serves to protect a municipality, as well as its *officers or employees who are sued in their official capacity*, from suits arising from torts committed while the officers or employees are performing a governmental function." *Schlossberg v. Goins*, 141 N.C. App. 436, 439, 540 S.E.2d 49, 52 (2000) (emphasis supplied). Governmental immunity is "absolute unless the City has consented to [suit] or otherwise waived its right to immunity." *Id.* at 440, 540 S.E.2d at 52.

In order to "overcome a defense of governmental immunity, the complaint must specifically allege a waiver of governmental immunity. Absent such an allegation, the complaint fails to state a cause of action." *Paquette v. Cnty. of Durham*, 155 N.C. App. 415, 418, 573 S.E.2d 715, 717 (2002) (internal citations omitted), *disc. review denied*, 357 N.C. 165, 580 S.E.2d 695 (2003). No particular language is required to allege a waiver of governmental immunity, but the complaint must "allege facts that, if taken as true, are sufficient to establish a waiver by the State of [governmental] immunity." *Green v. Kearney*, 203 N.C. App. 260, 268, 690 S.E.2d 755, 762 (2010) (internal quotation marks and citation omitted).

Here, Plaintiff questions why Defendant raises governmental immunity in its brief "since neither the City of Greensboro nor any other governmental unit was sued in this case, and no issue of governmental immunity arises." A defendant's assertion of governmental immunity not only protects a municipality, but also "its officers or employees who are sued in their official capacity." *See Schlossberg*, 141 N.C. App. at 439, 540 S.E.2d at 52.

Plaintiff may have intended to sue Defendant only in his individual capacity, but Plaintiff's complaint sues Defendant both "[i]ndividually and in his Official Capacity as Captain of the Greensboro Police Department." Regarding the claim against Defendant in his official capacity, Plaintiff's complaint failed to specifically allege any waiver of governmental immunity. Defendant was entitled to entry of summary judgment on his affirmative defense of governmental immunity for Plaintiff's claims in his official capacity. In the absence of Plaintiff's allegation of waiver, the trial court should have granted Defendant's

motion on this ground. That portion of the trial court's order judgment is reversed.

C. Public Official Immunity

[3] The defense of public official immunity is a "derivative form" of governmental immunity. *Epps*, 122 N.C. App. at 203, 468 S.E.2d at 850. Public official immunity precludes suits against public officials in their individual capacities and protects them from liability "[a]s long as a public officer lawfully exercises the judgment and discretion with which he is invested by virtue of his office, keeps within the scope of his official authority, and acts without malice or corruption[.]" *Smith v. State*, 289 N.C. 303, 331, 222 S.E.2d 412, 430 (1976) (citation omitted). "Actions that are malicious, corrupt or outside of the scope of official duties will pierce the cloak of official immunity[.]" *Moore v. Evans*, 124 N.C. App. 35, 42, 476 S.E.2d 415, 421 (1996) (citations omitted).

A malicious act is one which is: "(1) done wantonly, (2) contrary to the actor's duty, and (3) intended to be injurious to another." *Wilcox v. City of Asheville*, 222 N.C. App. 285, 289, 730 S.E.2d 226, 230 (2012), *disc. review denied and appeal dismissed*, 366 N.C. 574, 738 S.E.2d 363 (2013); *see In re Grad v. Kaasa*, 312 N.C. 310, 313, 321 S.E.2d 888, 890 (1984) ("A defendant acts with malice when he wantonly does that which a man of reasonable intelligence would know to be contrary to his duty and which he intends to be prejudicial or injurious to another.").

Absent evidence to the contrary, this Court presumes public officials "discharge their duties in good faith and exercise their powers in accord with the spirit and purpose of the law." *Strickland v. Hedrick*, 194 N.C. App. 1, 10, 669 S.E.2d 61, 68 (2008) (quoting *Leete v. County of Warren*, 341 N.C. 116, 119, 462 S.E.2d 476, 478 (1995)). Any evidence presented to rebut this presumption "must be sufficient by virtue of its reasonableness, not by mere supposition. It must be factual, not hypothetical; supported by fact, not by surmise." *Id.* at 11, 669 S.E.2d at 68 (quoting *Dobson v. Harris*, 352 N.C. 77, 85, 530 S.E.2d 829, 836 (2000); *see Vest v. Easley*, 145 N.C. App. 70, 75, 549 S.E.2d 568, 573 (2001) ("A mere allegation is not sufficient to overcome summary judgment.").

In *Strickland*, this Court held where public officers adequately produced evidence of good faith supporting their motion for summary judgment, it "trigger[ed] the opposing party's responsibility to come forward with facts, as distinguished from allegations, sufficient to indicate he will be able to sustain his claim at trial." *Strickland*, 194 N.C. App. at 14, 669 S.E.2d at 70 (internal quotation marks and citations omitted). The plaintiff in *Strickland* failed to produce such evidence. *Id.* Rather, the

plaintiff's testimony "largely corroborated that of the [d]efendants" and "proffered no evidence of actions by these officers outside the scope of their employment, no evidence of corruption, and no evidence supporting their contention that the warrants were issued upon false testimony." *Id.* at 15, 669 S.E.2d at 70. This Court emphasized the officers never met the plaintiffs and their interactions with the plaintiffs were limited to the night the incident occurred and routine police procedures following the incident. *Id.* at 13, 669 S.E.2d at 69.

Unlike in *Strickland*, Plaintiff's complaint and affidavit raise a genuine issue of material fact regarding whether Defendant acted with malice toward Plaintiff. Plaintiff's affidavit largely contradicts, not corroborates, the statements asserted in the affidavits produced by Defendant. *See id.* at 14, 669 S.E.2d at 70. Plaintiff denies Defendant's statements that he refused to present Defendant with information regarding the lease for unit 308. He denies any allegation of gang-related activity and asserts Defendant produced no documentation from DOC tending to show Plaintiff's involvement in such activity.

Plaintiff also denies not cooperating with and impeding the officers' investigations. He claims he had previously been harassed by officers and had simply made other tenants aware of their rights. Furthermore, Plaintiff asserts the magistrate questioned the officers' arrest and pursuit of charges against Plaintiff and who seemed unwilling to issue the warrant, and that all the charges were dismissed by the District Attorney. These sworn assertions almost wholly contradict statements in the affidavits produced by Defendant. While not determinative, and viewed in the light of the non-moving party, these assertions raise genuine issues of material fact and tend to show Defendant's actions against Plaintiff may have been improperly motivated.

Also unlike in *Strickland*, Defendant and the other officers involved had previously interacted with Plaintiff on many occasions. *Id.* at 13, 669 S.E.2d at 69. Defendant relied on his prior knowledge and reputation of Plaintiff, most of which Plaintiff asserts to be incorrect, to make the arrest. Again, this evidence tends to raise genuine issues of material fact regarding whether Defendant's actions against Plaintiff were improperly motivated by malice due to his previous interactions with Plaintiff.

After considering the evidence presented in the pleadings, affidavits, and hearing arguments of counsel, the trial court found genuine issues of material fact existed regarding Plaintiff's tort claims against Defendant. Based upon our *de novo* review of the record and Defendant's burden on appeal to show error, the trial court properly denied Defendant's motion

for summary judgment concerning Plaintiff's claims against Defendant in his individual capacity.

V. Conclusion

The trial court erred in denying Defendant's motion for summary judgment on the ground of governmental immunity. Plaintiff sued Defendant in his official capacity and failed to meet the pleading requirements of alleging waiver to overcome Defendant's claim of governmental immunity.

The trial court did not err by denying Defendant's motion for summary judgment concerning Plaintiff's tort claims against Defendant in his individual capacity. Plaintiff's complaint and affidavit forecast triable issues of fact that exist on whether Defendant's actions were improperly motivated by malice.

The order denying summary judgment appealed from is reversed in part, as it concerns Defendant's affirmative defense of governmental immunity. The order is affirmed in part, as it concerns Defendant's affirmative defense of public official immunity. This case is remanded for entry of judgment of dismissal on Defendant's affirmative defense of governmental immunity in his official capacity, and for further proceedings on Plaintiff's claims against Defendant in his individual capacity.

AFFIRMED IN PART; REVERSED IN PART, AND REMANDED.

Judges CALABRIA and DAVIS concur.

HEARD-LEAK v. N.C. STATE UNIV. CTR. FOR URBAN AFFAIRS

[250 N.C. App. 41 (2016)]

JoEVELYN HEARD-LEAK, Petitioner
v.
N.C. STATE UNIVERSITY CENTER FOR URBAN AFFAIRS, Respondent

No. COA15-1300

Filed 18 October 2016

Public Officers and Employees—career state employee—procedural requirements for dismissal

The administrative law judge (ALJ) erred by granting petitioner career state employee's motion for summary judgment since respondent met the procedural requirements of N.C.G.S. § 126-35 prior to dismissing petitioner. The case was remanded to the ALJ pursuant to N.C.G.S. § 150B-51(d) with instructions to recommence proceedings in order for respondent to complete its case-in-chief regarding petitioner's dismissal for just cause.

Appeal by respondent from order entered 31 August 2015 by Judge Donald W. Overby in the Office of Administrative Hearings. Heard in the Court of Appeals 8 August 2016.

Hilliard & Jones Attorneys at Law, by Thomas Hilliard III, for petitioner-appellee.

Attorney General Roy Cooper, by Assistant Attorney General Matthew Tulchin, for respondent-appellant.

CALABRIA, Judge.

North Carolina State University Center for Urban Affairs and Community Services ("respondent") appeals from an order granting summary judgment in favor of JoEvelyn Heard-Leak ("petitioner"). We reverse and remand.

I. Background

Petitioner, a career State employee, was employed by respondent as an educational consultant. Respondent has a contract with the North Carolina Department of Public Instruction to review statewide testing and develop and implement new and improved testing based on the statewide curriculum. Petitioner's primary duties included developing polished and error-free items for science tests. In addition, petitioner was responsible for managing teacher item writing, reviewing contracts

with teachers, and assisting with any other test development projects as directed. In order for respondent to meet client deadlines, it was necessary for petitioner to complete assigned work in a timely manner.

From November 2008, when petitioner was hired, until April 2013, petitioner's supervisor was Yevonne Brannon ("Brannon"), the Director for Research and Evaluation at the Center. In April 2013, petitioner's office was moved to a different facility because of the Center's changing needs, and Sheila Brown ("Brown"), the Program Manager, became petitioner's new direct supervisor. On 10 April 2013, Brown met with petitioner to discuss her new workplace expectations. Although Brown quickly grew concerned about petitioner's work performance and unexplained absences, she waited to address these concerns until petitioner's interim performance appraisal meeting in December 2013. Brown did not include her concerns on petitioner's interim appraisal form, but instead, decreased petitioner's work assignments to 20-24 items per day in order to help her meet expectations. Even though petitioner's performance target was already reduced compared to the other writers in her department, on 9 January 2014, her assignments were further decreased to 16-24 items per day.

From January to April 2014, petitioner completed 41 items, an average of less than 1 item per day. On 29 April 2014, respondent issued petitioner a Written Warning for Unsatisfactory Job Performance ("the 29 April 2014 warning letter") that included the dates on which petitioner completed tasks or failed to do so. According to the 29 April 2014 warning letter, petitioner not only failed to perform her writing requirements but also left work early, was absent without any notice or reason, and was warned that she could be dismissed if she failed to improve. Brown placed petitioner on a Performance Improvement Plan ("PIP") to address the issues outlined in this warning. The PIP required bi-weekly meetings to provide petitioner with guidance, feedback, and support. On 16 May 2014, petitioner claimed that the work expectations were unreasonable. Brannon asked petitioner to explain what she thought was reasonable to enable her to establish new goals. Despite the PIP, petitioner continued to fail to meet productivity expectations.

On 15 July 2014, respondent issued petitioner a Final Written Warning for Unsatisfactory Job Performance ("15 July 2014 warning letter"), notifying petitioner that she "ha[d] failed to conform to the performance items and [that] there ha[d] been little to no improvement in [her] work." In addition, the 15 July 2014 warning letter notified petitioner that if she failed to demonstrate "immediate, significant, and sustained improvement," it could result in disciplinary action "up to and including dismissal."

Petitioner failed to improve her performance. On 11 September 2014, respondent issued a Notice of Pre-Dismissal Conference for Unsatisfactory Job Performance ("11 September 2014 pre-dismissal letter"). Respondent stated that between 1 May and 22 August 2014, petitioner only worked 46 of 80 workdays and wrote just 63 items, instead of the expected 230. According to the 11 September 2014 pre-dismissal letter, "there continu[ed] to be no significant and sustained improvement in [petitioner's] work performance and production[;]" petitioner was "performing at levels far below positional expectations and for someone with [her] level of experience and content knowledge[;]" and "[d]espite continued coaching, mentoring, feedback, multiple disciplinary actions and an unsatisfactory performance review for the 2013-2014 cycle, [petitioner] continued to fail to increase [her] productivity and complete the minimal item writing and reviewing expectations of a content specialist."

At the pre-dismissal conference held on 15 September 2014, petitioner was asked whether she had complied with expectations and she responded, "no." When petitioner was asked if she completed 5 items on any day, she responded, "no." Although petitioner was given the opportunity to present evidence rebutting the recommendation for dismissal for unsatisfactory work performance, she failed to present any evidence and failed to indicate that her performance would improve in the future.

On 17 September 2014, petitioner received a Notice of Dismissal for Unsatisfactory Job Performance ("17 September 2014 dismissal letter"), which detailed the issues and actions that led to the termination of her employment with respondent. The 17 September 2014 dismissal letter specifically referenced the two warning letters, the bi-weekly progress meetings, the 11 September 2014 pre-dismissal letter, and the pre-dismissal conference.

On 19 November 2014, petitioner filed a grievance pursuant to the University of North Carolina System SPA Employee Grievance Policy, alleging that her dismissal lacked just cause and was due to discrimination. On 30 January 2015, petitioner was informed of the final decision upholding her dismissal because respondent "met both the procedural and substantive requirements to dismiss [petitioner] for unsatisfactory job performance" and petitioner did not meet her burden of showing that her dismissal was based on discrimination. The final decision included everything that was in her notice of dismissal, as well as performance and attendance warnings from April 2013 and petitioner's performance appraisal from 12 December 2013.

Since petitioner believed she was dismissed without just cause, she filed a Petition for a Contested Case Hearing on 16 February 2015. At the hearing, respondent presented evidence through Brown and Brannon. Brown testified that in making the decision to discipline petitioner, they considered all of the written warnings issued, as well as documentation showing "that we had concerns with [petitioner's] productivity for several months and actually about a year prior." Both Brannon and Brown testified that since they viewed the interim meeting as an opportunity to discuss methods to help petitioner improve, they did not want to document concerns that they felt could be resolved through a discussion.

Because of scheduling conflicts, the hearing was recessed and rescheduled. Petitioner filed a Motion for Summary Judgment on 7 August 2015, asserting that she was entitled to judgment as a matter of law since respondent failed to comply with N.C. Gen. Stat. § 126-35 because it "failed to provide petitioner with a statement . . . describing in numerical order all specific acts or omissions that were the reasons for her dismissal" based on Brown's 16 June 2015 testimony. The ALJ concluded that because "considerable information concerning petitioner's work history, which was beyond the notice given petitioner as to the reasons for her termination, was considered by respondent," respondent "exceeded authority, acted erroneously, failed to use proper procedure and failed to act as required by law" in dismissing petitioner. As a result, the ALJ granted petitioner's motion for summary judgment and ordered retroactive reinstatement, back pay, and attorney's fees. The ALJ made no written findings of fact or additional conclusions of law. Respondent appeals.

II. Notice of Reasons for Dismissal

Respondent argues that the ALJ erred by granting petitioner's motion for summary judgment since respondent met the procedural requirements of N.C. Gen. Stat. § 126-35 prior to dismissing petitioner. We agree.

A. Standard of Review

Judicial review of an agency's summary judgment ruling is governed by N.C. Gen. Stat. § 150B-51(d) (2015):

> In reviewing a final decision allowing . . . summary judgment, the court may enter any order allowed by G.S. 1A-1, Rule 12(c) or Rule 56. If the order of the court does not fully adjudicate the case, the court shall remand the case to the administrative law judge for such further proceedings as are just.

We apply the same review standard established by Rule 56 of the North Carolina Rules of Civil Procedure when reviewing an agency's summary judgment ruling, and our scope of review is *de novo*. *See Krueger v. N.C. Criminal Justice Educ. & Training Standards Comm'n*, 198 N.C. App. 569, 576, 680 S.E.2d 216, 221 (2009).

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c). "[W]hen considering a summary judgment motion, "all inferences of fact . . . must be drawn against the movant and in favor of the party opposing the motion." *Craig ex rel. Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 353-54 (2009) (citations and additional quotation marks omitted). Whether notice is adequate is a question of law; however, "[t]he legal question of whether a dismissal letter is *sufficiently* particular has always been fact-specific." *Barron v. Eastpointe Human Servs. LME*, __ N.C. App. __, __, 786 S.E.2d 304, 314 (2016) (internal citation and quotation marks omitted).

B. Analysis

N.C. Gen. Stat. § 126-35(a) provides in pertinent part that, before a career State employee may be terminated for disciplinary reasons, "the employee shall . . . be furnished with a statement in writing setting forth the specific acts or omissions that are the reasons for the [termination]." In interpreting the notice requirement of this statute, this Court has explained that the purpose of N.C. Gen. Stat. § 126-35 "is to provide the employee with a written statement of the reasons for his discharge so that the employee may effectively appeal his discharge." *Leiphart v. N.C. Sch. of the Arts*, 80 N.C. App. 339, 350-51, 342 S.E.2d 914, 922 (1986); *see also Emp't Sec. Comm'n v. Wells*, 50 N.C. App. 389, 393, 274 S.E.2d 256, 259 (1981) ("An employee wishing to appeal his dismissal must be able to respond to agency charges and be able to prepare an effective representation."). Accordingly, "[t]he written notice must be stated 'with sufficient particularity so that the discharged employee will know precisely what acts or omissions were the basis of his [or her] discharge.' " *Barron*, __ N.C. App. at __, 786 S.E.2d at 314 (quoting *Wells*, 50 N.C. App. at 393, 274 S.E.2d at 259). Nonetheless, although an employee is entitled to notice of the acts and omissions underlying the disciplinary action, he or she is not entitled to "notice of every item of evidence pertaining to [the employee's] acts and omissions." *Blackburn v. N.C. Dep't*

of Pub. Safety, __ N.C. App. __, __, 784 S.E.2d 509, 519, *disc. review denied*, __ N.C. __, 786 S.E.2d 915 (2016).

In *Nix v. Dep't of Admin.*, 106 N.C. App. 664, 417 S.E.2d 823 (1992), the employee's dismissal letter stated that he "was being terminated because he 'had not been performing at the level expected by [his] position classification,' and because there had been no 'marked improvement' since the oral and the written warnings of earlier that year." *Id.* at 667, 417 S.E.2d at 826. The referenced warning letter stated that the employee "had been 'unable to satisfactorily fulfill the overall responsibilities required in [his] current position.' " *Id.* Accordingly, this Court held that the dismissal letter provided a "sufficiently specific statement of reasons under *Leiphart*, particularly since petitioner was already on notice due to the previous two warnings that he was not performing at the expected level." *Id.*

In *Skinner v. N.C. Dep't of Corr.*, 154 N.C. App. 270, 572 S.E.2d 184 (2002), this Court affirmed an employee's demotion based on unsatisfactory job performance where "he received two detailed written warning letters, as well as a notice of the pre-demotion conference outlining the specific grounds for the proposed disciplinary action." *Id.* at 280, 572 S.E.2d at 191. In reaching this decision, the Court noted that "[p]etitioner received two written warnings concerning his poor job performance, detailing petitioner's failure to follow proper procedure and failure to maintain sanitary conditions in the kitchen." *Id.* at 281, 572 S.E.2d at 192.

In the instant case, respondent's 17 September 2014 dismissal letter described in sufficient detail petitioner's acts and omissions underlying the reasons for her dismissal. According to the 17 September 2014 dismissal letter, petitioner's termination was due to unsatisfactory job performance on the basis that, *inter alia*, she had been provided numerous written warnings, yet "had not conformed to the performance items/expectations" and had shown "little to no improvement in [her] work or output." Respondent explained that petitioner's productivity and work output was considered and tracked beginning in January 2014, when she was informed that respondent expected 16-24 written items per day. According to the 29 April 2014 warning letter, petitioner had "demonstrated a consistent pattern of failing to engage in a productive and efficient manner, [and] failed to follow directives and complete work assignments in a timely and accurate manner[,]" as evidenced by specific instances of conduct on 11, 14, 15, 18, 22, 23, 24, 25, 28, and 29 April 2014. Although petitioner "ha[d] been given specific daily item targets, and provided specific timelines/targets to complete minimal item work, as well as again being provided specific item writing guidelines

that [she] ha[d] used since [she was] first employed [t]here[,]" she still "failed to complete the minimal item writing and reviewing expectations of a content specialist."

According to the 17 September 2014 dismissal letter, petitioner received the 15 July 2014 warning letter because she had not "demonstrat[ed] the improvement . . . needed to remain a contributor to the department." The 15 July 2014 warning letter detailed specific, ongoing problems with petitioner's work performance:

> As [Brown] advised at our previous meetings, your performance has not improved and continues to be unsatisfactory. The quality of your work is not at the level expected for someone with your level of experience and content knowledge. Many items do not follow our set item guidelines and have numerous grammatical and formatting errors. Your quantity of work is at a minimal level and insufficient for us to meet our deadlines for our client. Your production is lower than any other content specialist on our team, including those who are not, full-time, weekly employees. You continue to reject high numbers of items from our database, while failing to write items as requested.
>
> You have been provided with a very specific set of goals to improve your work production and have failed to meet those benchmarks on any day since May 1, 2014. Since our meeting on June 2, 2014, you have completed only 125 item reviews over 7 days (average of 17.85 daily). You failed to create and input items into our TDS as requested. You have continued to fail to increase your productivity and complete the minimal item writing and reviewing expectations of a content specialist.

Prior to the 17 September 2014 dismissal letter, petitioner received a pre-dismissal letter on 11 September 2014 stating that she had not shown any "significant and sustained improvement in work performance and production" and was "performing at levels far below positional expectations and for someone with [her] level of experience and content knowledge." As of that date, "[d]espite continued coaching, mentoring, feedback, multiple disciplinary actions and an unsatisfactory performance review for the 2013-2014 cycle," petitioner had failed "to increase [her] productivity and complete the minimal item writing and reviewing expectations of a content specialist." Finally, respondent's 17 September

2014 dismissal letter stated that at the pre-dismissal conference, petitioner "did not present information that would justify retaining [her] as an employee" and admitted that she had failed to comply with writing and performance expectations.

Considering the notice this Court held adequate in *Nix* and *Skinner*, we conclude the trial court erred by prematurely granting summary judgment on the "fact-specific" legal question of whether petitioner was provided sufficient notice prior to her termination. The 17 September 2014 dismissal letter described petitioner's acts and omissions with sufficient particularity to notify her "precisely what acts or omissions were the basis of [her] discharge." *Wells*, 50 N.C. App. at 393, 274 S.E.2d at 259. The evidence at this stage of the proceedings, taken in the light most favorable to respondent, indicates that petitioner: (1) had notice of her unsatisfactory performance review for the 2013-2014 cycle; (2) was put on a PIP that specifically outlined what she needed to do to improve her job performance and avoid disciplinary action; (3) participated in ongoing progress meetings where she received feedback, guidance, and counseling; (4) was given two detailed written warnings describing her specific failures to meet work expectations; (5) received a pre-disciplinary conference letter informing her that "dismissal [wa]s being considered due to [he]r ongoing unsatisfactory job performance"; and (6) participated in the pre-disciplinary conference that was held prior to her dismissal. Based on this evidence, petitioner was not deprived of her ability to "prepare an effective representation" or "effectively appeal h[er] discharge." *See Leiphart*, 80 N.C. App. at 350-51, 342 S.E.2d at 922-23. Petitioner received repeated notice that she was not performing at the expected level. More importantly, she received more specific notice than the employees in *Nix* and *Skinner*.

As a secondary matter, regarding the ALJ's reason, in part, for granting summary judgment on the basis that "[c]onsiderable information concerning [p]etitioner's work history with [r]espondent . . . was considered by [r]espondent in making the decision to terminate [p]etitioner," we emphasize that our Supreme Court recently listed an employee's "work history" as one of multiple factors of consideration deemed an "appropriate and necessary component of a decision to impose discipline [for just cause] upon a career State employee . . . ." *See Wetherington v. N.C. Dep't of Pub. Safety*, 368 N.C. 583, 592, 780 S.E.2d 543, 546 (2015). Furthermore, although a career State employee is entitled to adequate notice of the rationale underlying a disciplinary action, he or she is not entitled to notice of every single piece of evidence supporting the decision. *See Blackburn*, __ N.C. App. at __, 784 S.E.2d at 519 (rejecting the

petitioner-employee's argument "that he is entitled to notice, not only of the acts and omissions that were the basis of his termination, but also to notice of every item of evidence pertaining to these acts and omissions" because no authority supported "his vastly expanded view of 'notice' "). Therefore, respondent acted well within its authority to consider petitioner's work history when determining whether just cause existed to terminate her employment.

III. Conclusion

The trial court erred by granting summary judgment as a matter of law on the basis that respondent failed to comply with the procedural requirements of N.C. Gen. Stat. § 126-35(a). Additionally, our careful review of the record, transcripts, exhibits, and briefs in this case reveals no other justification for this Court to affirm the ALJ's summary judgment order. *See Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989) ("If the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal."). Therefore, the ALJ's order granting petitioner's motion for summary judgment must be reversed. In light of our disposition, we need not address respondent's remaining arguments on appeal.

Because our decision addresses only whether summary judgment was proper based on a threshold issue of procedure and "does not fully adjudicate the case, [we] shall remand the case to the administrative law judge," pursuant to N.C. Gen. Stat. § 150B-51(d), with instructions to recommence proceedings in order for respondent to complete its case-in-chief regarding petitioner's dismissal for just cause.

REVERSED AND REMANDED.

Chief Judge McGEE and Judge STROUD concur.

IN RE G.T.

[250 N.C. App. 50 (2016)]

IN THE MATTER OF G.T.

No. COA16-353

Filed 18 October 2016

1. Child Abuse, Dependency, and Neglect—neglect—sufficiency of findings of fact

The trial court did not err by adjudicating a minor child as neglected. The findings were sufficient for the trial court to conclude that the child did not receive proper care, supervision, or discipline from respondent mother and that he lived in an environment injurious to his welfare. It is proper for a trial court to adjudicate a juvenile neglected, even if the juvenile never actually resided in the parent's home.

2. Child Abuse, Dependency, and Neglect—neglect—chronic or toxic exposure to alcohol or controlled substances—required findings at disposition

The trial court erred in a child neglect case by ceasing reasonable reunification efforts based on respondent mother's chronic or toxic exposure to alcohol or controlled substances that causes impairment of or addiction in the juvenile. N.C.G.S. § 7B-901(c)(1)(e) required the trial court to make findings at disposition that a court of competent jurisdiction had already determined that the parent allowed the continuation of chronic or toxic exposure. This portion of the trial court's disposition order was reversed.

3. Appeal and Error—mootness—motion to continue

Although respondent mother contended that the trial court erred by denying her a continuance to prepare for a hearing on the issue of whether the trial court was required to cease reasonable reunification efforts, this argument was moot since the trial court's dispositional determination ceasing reunification efforts was reversed.

Judge DILLON concurring in part and dissenting in part.

Appeal by respondent-mother from orders entered 3 and 26 February 2016 by Judge Ward D. Scott in Buncombe County District Court. Heard in the Court of Appeals 19 September 2016.

Matthew J. Putnam for petitioner-appellee Buncombe County Department of Social Services.

Joyce L. Terres for respondent-appellant mother.

Michael N. Tousey for guardian ad litem.

McCULLOUGH, Judge.

Respondent-mother appeals from: (1) an adjudication order concluding that G.T. ("Gavin")[1] was a neglected and dependent juvenile; and (2) a disposition order concluding that it was in the juvenile's best interest to remain in the custody of the Buncombe County Department of Health and Human Services ("DHHS") and that reasonable reunification efforts with respondent-mother shall cease. After careful review, we affirm the trial court's adjudication order, but reverse the disposition order in part.

I. Background

In early July 2015, DHHS obtained non-secure custody of Gavin and filed a petition alleging that he was a neglected and dependent juvenile. Gavin was a newborn at the time, and both he and his mother were still in the hospital. The petition alleged that respondent-mother used marijuana, methamphetamine, and cocaine during her pregnancy, and that Gavin had a rapid heartbeat and was showing signs of withdrawal. Gavin's toxicology results were still pending at the time of the petition. The petition also alleged that respondent-mother was belligerent and combative with hospital staff, refused to take her psychiatric medication, and was being held on an involuntary commitment. During one instance, respondent-mother had to be restrained and Gavin removed from her arms. Further, the petition alleged that respondent-mother had a domestic violence protective order ("DVPO") against Gavin's father. He allegedly stabbed respondent-mother and dislocated her jaw, had several criminal charges pending as a result, and had a concerning criminal history.

The trial court held a hearing on 12 November 2015 and subsequently entered an adjudication and interim disposition order. Respondent-mother stipulated that the allegations contained in the petition, with some modifications, could be found as fact by the trial court by clear and convincing evidence. Based on the stipulated findings of fact, the trial court concluded that Gavin was a neglected and dependent juvenile. In

1. A pseudonym is used to protect the identity of the juvenile and for ease of reading.

the interim disposition portion of the order, the trial court concluded that it was in Gavin's best interest to remain in DHHS custody.

The trial court held a disposition hearing on 3 December 2015 and subsequently entered a disposition order. The trial court concluded that it was in Gavin's best interest to remain in DHHS custody. The trial court also directed that, pursuant to N.C. Gen. Stat. § 7B-901(c) (2015), reasonable reunification efforts with respondent-mother shall cease. This conclusion was based upon the trial court's finding that Gavin was subjected to chronic or toxic exposure to controlled substances that resulted in impairment of and addiction in Gavin at birth. Respondent-mother timely appeals.[2]

II. Discussion

A. Adjudication of Neglect

[1] On appeal, respondent-mother first challenges the trial court's adjudication of neglect. Review of a trial court's adjudication of neglect requires a determination as to (1) whether clear and convincing evidence supports the findings of fact, and (2) whether the findings of fact support the legal conclusions. *In re Pittman*, 149 N.C. App. 756, 763-64, 561 S.E.2d 560, 566 (2002) (citation omitted). "In a non-jury neglect adjudication, the trial court's findings of fact supported by clear and convincing competent evidence are deemed conclusive, even where some evidence supports contrary findings." *In re Helms*, 127 N.C. App. 505, 511, 491 S.E.2d 672, 676 (1997) (citations omitted). If competent evidence supports the findings, they are "binding on appeal." *In re McCabe*, 157 N.C. App. 673, 679, 580 S.E.2d 69, 73 (2003) (citations omitted). Here, respondent-mother does not dispute the fact that her stipulation to the findings of fact was proper. As a result, the findings of fact are presumed to be supported by competent evidence and are binding on appeal. *See In re M.D.*, 200 N.C. App. 35, 43, 682 S.E.2d 780, 785 (2009).

Respondent-mother, however, argues that the trial court's findings of fact are not sufficient to support the trial court's conclusion that Gavin was a neglected juvenile. She contends that none of the trial court's findings of fact relate to her care of Gavin, show that Gavin suffered an impairment, or prove a nexus between her drug use and any harm to Gavin. We disagree.

---

2. The father was a party to the trial court proceedings but does not appeal.

A neglected juvenile is defined as:

> A juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or who has been placed for care or adoption in violation of law.

N.C. Gen. Stat. § 7B-101(15) (2015). Additionally, this Court has consistently required that "there be some physical, mental, or emotional impairment of the juvenile *or a substantial risk of such impairment* as a consequence of the failure to provide proper care, supervision, or discipline in order to adjudicate a juvenile neglected." *In re McLean*, 135 N.C. App. 387, 390, 521 S.E.2d 121, 123 (1999) (internal quotations omitted) (emphasis in original).

In arguing that the findings do not support an adjudication of neglect, respondent-mother focuses largely on the findings of fact regarding her drug use while pregnant. However, she overlooks the fact that the trial court made findings regarding the father's domestic violence towards her and took judicial notice of respondent-mother's DVPO, both of which support the adjudication of neglect. In the DVPO, a district court found as follows: the father placed respondent-mother in the fear of imminent serious bodily injury; he placed her in the fear of continued harassment that rises to such a level as to inflict substantial emotional distress; he inflicted serious injury upon respondent-mother in that he dislocated her jaw and stabbed her; and he made threats to kill or seriously injure respondent-mother. As a result of these findings, the district court entered a no-contact order against the father. Furthermore, the stipulated findings show that the father was charged criminally based on his actions, that he held a gun to respondent-mother's head, and that he threatened to kill her. Despite the no-contact order, the father was at the hospital following Gavin's birth.

Respondent-mother's erratic behavior in the hospital also supports the adjudication of neglect. The findings demonstrate that respondent-mother was being held on an involuntary commitment, that she was belligerent towards hospital staff, and that the hospital staff would not permit respondent-mother to be alone with Gavin.

Lastly, the findings clearly show that respondent-mother used controlled substances during her pregnancy. She originally admitted to using marijuana, cocaine, and methamphetamine. She later altered her story,

claiming that the father laced her marijuana with cocaine and denying the use of methamphetamine. It was well within the trial court's discretion to believe her original admission. However, even if respondent-mother's story is believed, she still admitted to using illegal drugs while pregnant. Therefore, contrary to respondent-mother's assertion, the findings of fact sufficiently establish that Gavin suffered actual exposure to controlled substances while in utero.

We therefore conclude that the findings were sufficient for the trial court to conclude that Gavin did not receive proper care, supervision, or discipline from his parent and that he lived in an environment injurious to his welfare. Gavin suffered an actual impairment due to his exposure to controlled substances, and respondent-mother's erratic behavior and disregard for the DVPO exposed him to a substantial risk of impairment. Additionally, we have repeatedly held that it is proper for a trial court to adjudicate a juvenile neglected, even if the juvenile never actually resided in the parent's home, as is the case here. *See, e.g.*, *In re B.M.*, 183 N.C. App. 84, 89, 643 S.E.2d 644, 647 (2007) (affirming an adjudication of neglect where a nine-day-old was removed from the mother's custody after testing positive for cocaine, the mother admitted to using cocaine prior to the juvenile's birth, there was domestic violence between the parents, and the mother refused to sign a safety agreement); *see also In re A.S.*, 190 N.C. App. 679, 690, 661 S.E.2d 313, 320 (2008), *aff'd.*, 363 N.C. 254, 675 S.E.2d 361 (2009) ("When . . . the juvenile being adjudicated has never resided in the parent's home, the decision of the trial court must of necessity be predictive in nature, as the trial court must assess whether there is a substantial risk of future abuse or neglect of a child based on the historical facts of the case.") (internal quotation marks and citation omitted). Accordingly, we conclude that the trial court did not err in concluding that Gavin was a neglected juvenile.

B. Dispositional Determination

[2] Next, respondent-mother challenges the trial court's dispositional determination to cease reasonable reunification efforts pursuant to N.C. Gen. Stat. § 7B-901(c) (2015).

In 2015, the North Carolina General Assembly made amendments to our Juvenile Code, specifically to those sections pertaining to permanency planning hearings and orders, the implementation of permanent plans, and the cessation of reunification efforts with a parent. *See* N.C. Sess. L. 2015-136. Because the amendments apply to all actions filed or pending on or after 1 October 2015, they are applicable to the instant case. As part of the amendments, the General Assembly added

subsection (c) to N.C. Gen. Stat. § 7B-901, the section governing a trial court's initial disposition hearing. The new subsection (c) permits the trial court to cease reunification efforts at an initial disposition hearing under certain circumstances. This section provides, in pertinent part, as follows:

> (c) If the disposition order places a juvenile in the custody of a county department of social services, the court shall direct that reasonable efforts for reunification as defined in G.S. 7B-101 shall not be required if the court makes written findings of fact pertaining to any of the following:
>
> (1) A court of competent jurisdiction has determined that aggravated circumstances exist because the parent has committed or encouraged the commission of, or allowed the continuation of, any of the following upon the juvenile:
>
> a. Sexual abuse.
>
> b. Chronic physical or emotional abuse.
>
> c. Torture.
>
> d. Abandonment.
>
> e. Chronic or toxic exposure to alcohol or controlled substances that causes impairment of or addiction in the juvenile.
>
> f. Any other act, practice, or conduct that increased the enormity or added to the injurious consequences of the abuse or neglect.
>
> (2) A court of competent jurisdiction has terminated involuntarily the parental rights of the parent to another child of the parent.
>
> (3) A court of competent jurisdiction has determined that (i) the parent has committed murder or voluntary manslaughter of another child of the parent; (ii) has aided, abetted, attempted, conspired, or solicited to commit murder or voluntary manslaughter of the child or another child of the parent; (iii) has committed a felony assault resulting in serious bodily injury to the child or another child

> of the parent; (iv) has committed sexual abuse against the child or another child of the parent; or (v) has been required to register as a sex offender on any government-administered registry.

N.C. Gen. Stat. § 7B-901(c)(1)-(3) (2015).

In the instant case, the trial court concluded that reasonable reunification efforts with respondent-mother were not required. This conclusion was based upon the following ultimate finding:

> Pursuant to N.C.G.S. § 7B-901(c), the Court hereby directs that reasonable reunification efforts with the respondent mother are not required as a result of:
>
> a. The respondent mother's admission of continued substance abuse resulting in impairment of, and addiction in, the juvenile at birth.
>
> b. Respondent mother's apparent lack of understanding or concern about the toxic effect of chronic substance abuse on the minor child.

Thus, the trial court's determination to cease reunification efforts was based on subsection (c)(1)(e): chronic or toxic exposure to alcohol or controlled substances that causes impairment of or addiction in the juvenile.

Respondent-mother challenges the trial court's determination based on several grounds. She first argues the statute's use of the term "has determined" must reference a prior adjudication hearing. Therefore, she argues, the statute directs the trial court to make the determination regarding chronic or toxic exposure to controlled substances in a prior adjudication order. Respondent-mother argues that because the trial court here made the determination in a disposition order, it is erroneous. For the reasons that follow, we agree.

The issue raised by respondent-mother is one of statutory interpretation. Our Supreme Court has repeatedly held that "[s]tatutory interpretation properly begins with an examination of the plain words of the statute." *Lanvale Properties, LLC v. Cty. of Cabarrus*, 366 N.C. 142, 154, 731 S.E.2d 800, 809 (2012) (internal quotation marks and citations omitted). " 'Questions of statutory interpretation are questions of law[.] . . . The primary objective of statutory interpretation is to give effect to the intent of the legislature. The plain language of a statute is the primary indicator of legislative intent.' " *Purcell v. Friday Staffing*, 235 N.C. App.

342, 346-47, 761 S.E.2d 694, 698 (2014) (quoting *First Bank v. S & R Grandview, L.L.C.*, 232 N.C. App. 544, 546, 755 S.E.2d 393, 394 (2014) (internal citations omitted)). "If the language of the statute is clear and is not ambiguous, we must conclude that the legislature intended the statute to be implemented according to the plain meaning of its terms." *Lanvale Properties*, 366 N.C. at 154, 731 S.E.2d at 809 (quotation marks and citations omitted).

Section 7B-901(c)(1), in pertinent part, states that the trial court shall direct reasonable reunification efforts to cease *if the trial court makes a finding* that:

> (1) *A court of competent jurisdiction* ***has determined*** that aggravated circumstances exist because the parent has committed or encouraged the commission of, or allowed the continuation of, any of the following upon the juvenile:
>
> . . . .
>
> e. Chronic or toxic exposure to alcohol or controlled substances that causes impairment of or addiction in the juvenile.

N.C. Gen. Stat. § 7B-901(c)(1)(e) (emphasis added). Thus, the dispositional court must make a finding that "[a] court of competent jurisdiction has determined" that the parent allowed one of the aggravating circumstances to occur. We conclude that the language at issue is clear and unambiguous and that in order to give effect to the term "has determined," it must refer to a prior court order. The legislature specifically used the present perfect tense in subsections (c)(1) through (c)(3) to define the determination necessary. Use of this tense indicates that the determination must have already been made by a trial court—either at a previously-held adjudication hearing or some other hearing in the same juvenile case, or at a collateral proceeding in the trial court. The legislature's use of the term "court of competent jurisdiction" also supports this position. Use of this term implies that another tribunal in a collateral proceeding could have made the necessary determination, so long as it is a court of competent jurisdiction.

We further find that the legislature's use of a contrasting verb tense in the main body of Section 7B-901(c) supports our statutory interpretation. Rather than using the present perfect tense, the main body states that the trial court "shall *direct*" reunification efforts to cease if the court "*makes* written findings of fact." N.C. Gen. Stat. § 7B-901(c) (emphasis

added). Had the legislature intended for the trial court to make the determination at a disposition proceeding, the verb tense used in subsection (1) would have mirrored that of the main body of Section 7B-901(c). Thus, by our plain reading of the statute, if a trial court wishes to cease reunification efforts pursuant to N.C. Gen. Stat. § 7B-901(c)(1)(e), it must make findings at disposition that a court of competent jurisdiction has already determined that the parent allowed the continuation of chronic or toxic exposure to alcohol or controlled substances that causes impairment of or addiction in the juvenile.

Here, the trial court made no such finding. The adjudication order contains no ultimate finding of fact that respondent-mother allowed the continuation of chronic or toxic exposure to controlled substances that caused impairment of or addiction in Gavin. Although the trial court's adjudication order contains anecdotal evidence regarding respondent-mother's drug use while pregnant, the findings state that the toxicology results were still pending, and the findings regarding Gavin's withdrawal and impairment were framed in terms of allegations received by DHHS, not in terms of conclusive findings of fact. Therefore, while the overall findings of fact were sufficient to sustain an adjudication of neglect, the specific findings related to Gavin's exposure to controlled substances were not sufficient to sustain an ultimate finding pursuant to N.C. Gen. Stat. § 7B-901(c)(1)(e).

Because the trial court erroneously concluded that reasonable reunification efforts must cease pursuant to N.C. Gen. Stat. § 7B-901(c)(1)(e), we reverse that portion of the trial court's disposition order.

C. Denial of Respondent-Mother's Continuance

[3] In her final argument, respondent-mother essentially contends that the trial court erred by denying her a continuance to prepare for a hearing on the issue of whether the trial court was required to cease reasonable reunification efforts pursuant to N.C. Gen. Stat. § 7B-901(c). Respondent-mother argues that she did not have notice of the guardian ad litem's intent to raise the issue at the disposition hearing, and that she has a right to notice and effective representation. She further contends that by denying a continuance of the matter, the trial court denied her effective assistance of counsel. However, because we have reversed the trial court's dispositional determination ceasing reunification efforts pursuant to N.C. Gen. Stat. § 7B-901(c), her argument is mooted. Accordingly, we need not address respondent-mother's final argument on appeal.

AFFIRMED AS TO ADJUDICATION ORDER; REVERSED IN PART AS TO DISPOSITION ORDER.

Judge DILLON concurs in part and dissents in part in a separate opinion.

Judge ENOCHS concurs.

DILLON, Judge, concurring in part and dissenting in part.

I. Discussion

A. Adjudication of Neglect

I concur with the majority that the trial court did not err in concluding that Gavin was a neglected juvenile at the adjudication phase of the proceeding.

B. Dispositional Determination

I dissent from the majority's conclusion that the trial court erred by directing that reasonable reunification efforts must cease pursuant to N.C. Gen. Stat. § 7B-901(c)(1)e. in its Initial Dispositional Order.[1]

The version of N.C. Gen. Stat. § 7B-901(c)(1)e. applicable to this proceeding provides that *if* the trial court finds that "[a] court of competent jurisdiction has determined that" one of the aggravated circumstances enumerated in the statute exists, *then* the trial court must "direct that reasonable efforts for reunification . . . shall not be required[.]" N.C. Gen. Stat. § 7B-901(c)(1)e. (2013).[2]

In the present case, the court determined itself that one of the enumerated, aggravated circumstances did exist; namely, that Mother has "allowed the continuation" of "[c]hronic or toxic exposure to alcohol or controlled substances that causes impairment of [Gavin]." *Id.* The

---

1. The trial court did not demand that the county reunification efforts *cease*. Rather, the court simply stated that the county was "not required" to use reasonable efforts for reunification, tracking the language of N.C. Gen Stat. § 7B-901(c).

2. This statute has since been amended (during the 2016 short session) to provide the trial court more discretion. Specifically, under the statute's current version, even where the trial court makes a finding concerning the existence of an aggravated circumstance, the trial court may, nonetheless, direct that reasonable efforts for reunification continue *if* the trial court "concludes that there is compelling evidence warranting continued reunification efforts[.]" 2016 Appropriations Act, § 12C.1.(g), Session Law 2016-94 (codified as amended at N.C. Gen. Stat. § 7B-901(c)(2016)).

court's determination was based on its findings that Mother had used controlled substances while she was pregnant with Gavin, that Gavin was currently impaired and was undergoing treatment due to his exposure to these drugs, and that Mother still used and intended to continue using illegal drugs. Specifically, the trial court found that: (1) Mother "tested positive for benzos"; (2) Mother admitted that she was currently using marijuana; (3) Gavin "has withdrawal symptoms and has been on methadone for months, which shows the toxic effects of chronic exposure to [Mother's] use of controlled substances during pregnancy"; and (4) Mother "intends to continue to use marijuana despite the impact her illegal drug use has had on her ability to parent." Accordingly, the trial court concluded that reasonable efforts for reunification were not required pursuant to N.C. Gen. Stat. § 7B-901(c)(1)e.

The majority concludes that the trial court erred in directing that reasonable efforts for reunification were not required. The majority reaches this conclusion based on its reading of a portion of N.C. Gen. Stat. § 7B-901(c), which provides that the trial court (at the initial dispositional hearing stage) shall direct that reunification efforts no longer be required if that court finds that "*[a] court of competent jurisdiction has determined that*" an aggravated circumstance exists. N.C. Gen. Stat. § 7B-901(c). The majority reads this language to mean that the trial court cannot direct that reunification efforts are no longer required based on *its own* determination that an aggravated circumstance exists. Rather, the majority reads the statutory language to mean that the determination regarding the existence of an aggravated circumstance must be made in some *prior* order by a court of competent jurisdiction, either in the same cause or in some other proceeding.

I disagree with the majority's restrictive reading of N.C. Gen. Stat. § 7B-901(c). I agree with the majority that the statutory language provides that the trial court at the initial dispositional hearing stage *may* rely on a determination made in some *prior* order. But I also believe that the General Assembly intended that the court at that stage could *itself* consider evidence and determine the existence of an aggravated circumstance, and, based on its own determination, conclude that "a court of competent jurisdiction" has made the determination sufficient to relieve DSS from having to pursue reunification. Certainly, the Buncombe County District Court is "a court of competent jurisdiction," whether at the initial dispositional hearing phase or at some prior stage of the proceeding. And, here, that court at the initial dispositional phase "has determined" that an aggravated circumstance exists.

Under the majority's interpretation of the statute, the trial court here would not have committed error if it had simply entered *two* separate orders, instead of one; namely, an order determining the existence of the aggravated circumstance *and then* an initial dispositional order based on the first order's determination. However, under the majority's interpretation, the trial court here committed error simply by issuing a single order combining these two steps. I do not think this result was intended by the General Assembly, and this result is certainly not compelled by the phrase "has determined" in the statute. Rather, I believe that the General Assembly intended that a trial court, even at the initial dispositional hearing phase, continued to have authority to consider any reliable evidence and make any determination(s) based on that evidence as to the presence of an aggravated circumstance in its effort to determine the appropriate plan for the juvenile. *See In re Vinson*, 298 N.C. 640, 666, 260 S.E.2d 591, 607 (1979) (discussing the broad powers of the district court to consider evidence and matters at the dispositional phase).

C. Denial of Mother's Continuance

Mother argues that the trial court erred in denying her a continuance to prepare for a hearing, contending that she was not aware that the issue regarding reunification efforts would be raised. The majority held that this issue was moot based on its reversal of the dispositional order. I would reach this third issue.

Based on my review of the record, I conclude that the trial court did not err in proceeding with the hearing. Here, competent evidence demonstrates that Gavin was exposed to toxic substances during the pregnancy and that he was required to receive treatment from birth for many months. Mother stipulated that she used cocaine, methamphetamines, and marijuana during the pregnancy. There were undisputed reports that Gavin was receiving methadone to treat his addiction and that he was suffering from tremors. *See In re L.G.I.*, 227 N.C. App. 512, 515-16, 742 S.E.2d 832, 835 (2013) (determining that evidence of illegal drugs in a newborn's system coupled with the mother's admission that she used illegal drugs during the pregnancy is sufficient to support a conclusion that the mother's drug use caused the presence of illegal drugs in her newborn). This evidence was sufficient to sustain the trial court's determination that Gavin was impaired due to his exposure to illegal drugs consumed by Mother during the pregnancy; and the trial court did not err in proceeding with the hearing. *See In re Vinson*, 298 N.C. at 669, 260 S.E.2d at 608 (stating that a trial court may consider matters not raised

in the petition during a dispositional hearing, so long as the information is reliable, accurate, and competently obtained).

II. Conclusion

My vote is to affirm Judge Scott's orders.

IN THE MATTER OF K.G.W.

No. COA16-247

Filed 18 October 2016

Termination of Parental Rights—psychologist testimony—weight of evidence

The trial court did not err by terminating respondent mother's parental rights. The trial judge was the trier of fact and determined that under the unique circumstances of this case and the characteristics of this juvenile, an expert evaluation by a psychologist who had not worked with the juvenile and who lacked experience in juvenile court matters was not helpful.

Appeal by respondent-mother from orders entered 5 November 2015 by Judge Monica H. Leslie and 3 December 2015 by Judge Roy T. Wijewickrama in District Court, Haywood County. Heard in the Court of Appeals 26 September 2016.

Rachael J. Hawes, for petitioner-appellee Haywood County Health and Human Services Agency.

Leslie Rawls, for respondent-appellant.

Parker Poe Adams & Bernstein LLP, by Michael J. Crook, for guardian ad litem.

STROUD, Judge.

Respondent appeals from the trial court's orders terminating her parental rights to her minor child, Ginny.[1] For the following reasons, we affirm.

1. A pseudonym is used to protect the identity of the juvenile and for ease of reading.

I. Background

On 4 January 2013, the Haywood County Department of Social Services[2] ("DSS") filed a petition alleging Ginny was an abused, neglected, and dependent juvenile because two days earlier Ginny arrived at school with injuries she said were from her "father" spanking her and "accidentally" punching her in the nose; this same date the trial court ordered DSS receive non-secure custody of Ginny. On 4 March 2013, the trial court entered an order adjudicating Ginny to be an abused and neglected juvenile.

On 12 December 2014, the trial court entered an order changing the permanent plan for Ginny to adoption and directing DSS to file a petition to terminate parental rights to Ginny. On 17 February 2015, DSS filed a petition for termination of respondent's parental rights to Ginny alleging grounds of abuse, neglect, failure to make reasonable progress to correct the conditions that led to Ginny's removal from her home, failure to pay a reasonable portion of the cost of Ginny's care while she was in DSS custody, and dependency. On 5 November 2015, the trial court entered an order concluding that grounds exist to terminate respondent's parental rights pursuant to neglect, failure to make reasonable progress to correct the conditions that led to Ginny's removal from her home, and failure to pay a reasonable portion of the cost of Ginny's care while she was in foster care. Thereafter, the trial court held a disposition hearing,

The trial court held a disposition hearing on 9 November 2015, wherein respondent attempted to offer Dr. Sandra Newes as an expert witness in clinical psychology. Upon objection from both DSS and the guardian ad litem, the trial court allowed a *voir dire* examination of Dr. Newes to determine if she qualified to testify as an expert witness in this particular case. After the *voir dire*, the trial court sustained DSS's and the guardian ad litem's objection and did not allow her to testify as an expert witness. However, the trial court did allow respondent to elicit testimony from Dr. Newes as an offer of proof. Ultimately, the trial court concluded that termination of respondent's parental rights was in Ginny's best interests, and on 3 December 2015 it entered an order terminating respondent's parental rights to Ginny.[3] Respondent appeals.

---

2. Now called the Haywood County Health and Human Services Agency.

3. The order also terminated the parental rights of Ginny's father, but he is not a party to this appeal.

II. Expert Witness

The only issues respondent raises on appeal are regarding Dr. Newes. Respondent argues that "(1) Dr. Newes qualified as an expert; (2) the testimony satisfied the requirements of N.C. R. Ev. 702(2); and (3) the testimony was relevant, reliable, and necessary to determine the child's best interest" because

> 3. Even under the more stringent Rules of Evidence Dr. Sandra Newes' expert testimony was admissible, because she qualified as an expert witness; her expert opinion was based on sufficient facts and data; and her opinion resulted from reliable principles and methods applied to the facts.
>
> 4. In excluding Dr. Newes testimony, the trial court improperly applied the Rules of Evidence instead of the statutory best interest hearing procedures, under which the rules of Evidence do not apply[.]
>
> 5. The trial court wrongfully excluded Dr. Newes' testimony based on matters that go to the weight of the evidence not its admissibility.
>
> 6. The trial court improperly limited Mother's offer of proof, saying "this is an offer of proof, not testimony."
>
> 7. The trial court's erroneous exclusion of Dr. Newes' expert testimony deprived Mother of a fundamental right and resulted in harm.

But we need not determine whether the trial court was required to consider Dr. Newes as an "expert witness" under Rule of Evidence 702 as defendant argues, since as a practical matter, the trial court found that Dr. Newes's testimony would not be helpful due to her lack of contact with the child and her lack of experience in juvenile neglect and dependency cases.

> Where scientific, technical, or other specialized knowledge *will assist the fact finder* in determining a fact in issue or in understanding the evidence, an expert witness may testify in the form of an opinion, N.C.R. Evid. 702, and the expert may testify as to the facts or data forming the basis of her opinion, N.C.R. Evid. 703.

State v. Kennedy, 320 N.C. 20, 32, 357 S.E.2d 359, 366 (1987) (emphasis added). Here, the trier of fact was the trial judge, not a jury.

The trial court found:

> 106. Dr. Sandra Newes was tendered to Court as an expert witness in the field of Clinical Psychology by Counsel for the Respondent Mother. The Court finds that Dr. Newes has never met with, observed, or tested the minor child. She has never had involvement in a Department of Social Services' case. There is insufficient evidence to show that any opinion Dr. Newes would provide to the Court in this case would be based on sufficient, reliable data in regard to this juvenile. The Court sustains the Agency and Guardian ad Litem Program's objection to Dr. Sandra Newes testifying as an expert witness in this case. *The Court specifically finds that Dr. Newes' [proffered] testimony will not assist the trier of fact to understand the evidence or determine any facts in issue.*

(Emphasis added.)

Thus, the trial court did not really determine that Dr. Newes did not meet the qualifications of professional education and experience to testify as an expert witness under Rule 702 but rather determined due to her unfamiliarity with the child, she simply had no testimony to offer which the trial judge as the trier of fact would deem to be persuasive. As the trier of fact, the trial judge was free to determine the credibility of the evidence and weigh it as he saw fit. *See Riley v. Ken Wilson Ford, Inc.*, 109 N.C. App. 163, 168, 426 S.E.2d 717, 720 (1993) ("When the trial judge sits as trier of fact she has the duty to determine the credibility of the witnesses and weigh the evidence; her findings of fact are conclusive on appeal if supported by competent evidence.") The trial court was under no obligation to consider Dr. Newes's testimony as credible or of substantial weight even if the trial court allowed her to testify as an expert witness. *See generally id.* Therefore, we need not address respondent's numerous issues on appeal regarding Rule 702 or other Rules of Evidence regarding expert testimony as this was not the basis of the trial court's sustaining the objection to Dr. Newes's testimony.

Respondent also argues that the trial court improperly limited her offer of proof regarding Dr. Newes. But the trial court allowed defendant and Dr. Newes to provide an offer of proof for approximately 14 pages of the transcript. The offer of proof sets forth the opinions which Dr. Newes would have presumably described in greater detail, if allowed to testify as an expert. As the trial court noted, "[t]his is an offer of proof[,]" and it was not testimony. The proffer was sufficient for the trial court

to understand Dr. Newes's evaluation of the case and opinions, but also sufficient for the trial court to determine that her lack of a personal evaluation of the child and her lack of juvenile court experience rendered her testimony of no use to the trial court.

Furthermore, the trial court did not, as respondent argues, "deprive[ ] Mother of a fundamental right [which] resulted in harm" by not permitting testimony from Dr. Newes as an expert witness, because again, the trier of fact's ability to weigh the evidence is paramount with any witness testimony, lay or expert. *See generally id.* Certainly it would have been helpful to respondent had the trial court weighed her evidence differently throughout this case, but as the trier of fact on this issue, the trial court was not bound to find respondent's evidence to be credible or give it more weight than any other evidence, so the trial court did not deny respondent's rights.

Respondent also argues that "[t]he trial court's findings of fact excluding Dr. Newes's expert testimony are not supported by the evidence[.]" Here too, respondent has numerous sub-points:

> 1. The evidence established that Dr. Newes' expert opinion was based on sufficiently reliable data regarding Ginny based on the standards in the psychology profession.
>
> 2. Dr. Newes' expert opinion related to Ginny's best interest and would assist an impartial trier of fact to understand the evidence and determine the primary fact at issue.
>
> 3. The trial court's unsupported findings of fact and order excluding Dr. Newes' testimony deprived Mother of her right to present evidence and receive a fair trial.

While respondent's argument is framed as a challenge to the findings of fact, she is really challenging the trial court's determination, in its discretion, *see generally id.*, that Dr. Newes's testimony would not be helpful based upon her lack of contact with the child and her lack of experience in juvenile matters. The trial court did not allow Dr. Newes to testify as an expert because he did not find her testimony persuasive due to the fact that she had "never met with, observed, or tested the minor child[, and s]he has never had involvement in a Department of Social Services' case." The "reliable data" respondent notes is Dr. Newes's expertise in her field, which is not at issue on appeal. Essentially, the trial court determined Dr. Newes did not have expertise "in regard to this juvenile" which was supported by the evidence.

Respondent also notes that it is not always necessary that an expert witness such as a psychologist or physician personally examine a person before they are permitted to testify as an expert witness about that person's condition. That is true but irrelevant to this case. This trial judge, who was also the trier of fact, determined that under the unique circumstances of this case and the characteristics of this juvenile, an expert evaluation by a psychologist who had not worked with the juvenile and who lacked experience in juvenile court matters was not helpful to the trier of fact. Another trial judge may have made a different discretionary determination and weighed the evidence differently and thus allowed Dr. Newes's testimony because it would be helpful to that trial judge, but as an appellate court, it is not our role to determine the weight to give to the evidence in either event. *See Kelly v. Duke Univ.*, 190 N.C. App. 733, 738–39, 661 S.E.2d 745, 748 (2008) ("On appeal, this Court may not reweigh the evidence or assess credibility.").

In summary, the trial court actually did not directly rule on respondent's request to allow Dr. Newes to testify *as an expert witness*; rather, the trial court determined that even if Dr. Newes was an expert in the field of clinical psychology, she simply did not have any evidence to offer to him as the trier of fact that he would deem to be credible and persuasive. The trial court allowed respondent to present a lengthy offer of proof, all of which the trial court heard. In actuality, respondent is asking this Court to weigh the evidence differently, in her favor, and conclude that Dr. Newes's opinion *should have been* useful to the trier of fact. We are not the fact finder; this we cannot do. *See id.* These arguments are overruled.

III. Conclusion

For the foregoing reasons, we affirm.

AFFIRMED.

Judges CALABRIA and INMAN concur.

IN RE T.W.

[250 N.C. App. 68 (2016)]

IN THE MATTER OF T.W.

No. COA16-399

Filed 18 October 2016

1. Child Abuse, Dependency, and Neglect—ceasing reunification efforts—sufficiency of findings of fact

The trial court erred in a child neglect and dependency case by ceasing reunification efforts under N.C.G.S. § 7B-901(c) at a permanency planning hearing subsequent to the initial dispositional hearing. Further, the trial court's additional findings failed to support the decision. The permanency planning order was vacated insofar as it provided that reunification efforts were not required and remanded for further proceedings.

2. Child Abuse, Dependency, and Neglect—legal custody of aunt—failure to verify adequate resources for care

The trial court violated N.C.G.S. § 7B-906.1(j) (2015) in a child neglect and dependency case by placing a minor child in the legal custody of his maternal aunt without verifying she would have adequate resources to care appropriately for the juvenile. This issue was remanded for further proceedings.

3. Child Visitation—denial—sufficiency of findings of fact

The trial court did not abuse its discretion in a child neglect and dependency case by denying visitation to a respondent mother. The court made the necessary findings to deny visitation.

4. Child Abuse, Dependency, and Neglect—waiver of further review hearings—required findings of fact

Although defendant mother claimed in a child neglect and dependency case that the trial court erred by waiving further review hearings without making the findings of fact required by N.C.G.S. § 7B-906.1(n), it was undisputed that the trial court did not make these findings. If on remand the court chooses to waive subsequent permanency planning hearings, it must comply with this requirement.

Appeal by Mother from order entered 11 January 2016 by Judge Rickye McKoy-Mitchell in Mecklenburg County District Court. Heard in the Court of Appeals 26 September 2016.

Associate Attorney Christopher C. Peace for petitioner-appellee Mecklenburg County Department of Social Services, Youth and Family Services.

The Opoku-Mensah Law Firm, by Gertrude Opoku-Mensah, for guardian ad litem.

Appellate Defender Glenn Gerding by Assistant Appellate Defender Joyce L. Terres for respondent-appellant mother.

INMAN, Judge.

Mother appeals from an order of the trial court which, *inter alia*, appointed her sister ("Aunt") as custodian of her minor child, Thomas,[1] born in February 2009. We affirm the order in part, vacate in part, and remand for further proceedings.

On 23 November 2014, Mecklenburg County Youth and Family Services ("YFS") received a report that Mother had exposed Thomas to inappropriate sexual activity and had licked his penis. A social worker interviewed Thomas, who confirmed that Mother licked his penis "on one occasion." Mother denied touching her son inappropriately but signed a safety assessment agreeing to have no contact with Thomas and allowing him to reside with his maternal great-grandmother ("Great-Grandmother"). Great-Grandmother later contacted YFS to report that Mother had come to her residence and taken Thomas. YFS returned to Mother's home and found the child. The police were called after Mother refused to allow YFS into her home. YFS took Thomas into non-secure custody and filed a juvenile petition alleging neglect and dependency on 24 November 2014.[2]

Mother was criminally charged with taking indecent liberties with a minor and sexual offense in a parental role on 3 January 2015. YFS transferred Thomas from foster care into the home of his maternal aunt ("Aunt") on the weekend of 31 January 2015.

At a hearing on 31 March 2015, Mother stipulated to the allegations in the petition filed by YFS. The trial court adjudicated Thomas a neglected and dependent juvenile by order entered 13 May 2015. At disposition, the court found that the barriers to reunification "include but are not necessarily limited to the inappropriate sexual contact of the juvenile by the mother, and exposure of the juvenile to inappropriate

1. The parties have adopted this pseudonym to protect the juvenile's privacy.

2. The petition alleged that Thomas' biological father was "on house arrest in Asheville, [North Carolina,] and there was no information provided about any additional paternal relatives [who] could care for the child."

sexual matters by the mother." The court denied Mother visitation and delayed requiring her to obtain a parenting capacity evaluation, because she was prohibited from having any contact with Thomas as a condition of pretrial release in her criminal case. The court ordered Mother to comply with all conditions of her family services agreement "that do not conflict with the criminal matter." It established a plan of care of reunification with a concurrent plan of guardianship or adoption.

In a review order entered 19 October 2015, the trial court found that Mother had obtained housing and employment "but is not complying with any treatment recommendations currently." Mother refused to participate in recommended substance abuse treatment. She participated only intermittently in mental health treatment and had rejected a recommended medication evaluation, "stating [that] it is not needed." The court noted that Mother's "therapist believes the mother has psychosis that requires further evaluation." As her criminal charges remained pending, Mother was allowed no visitation with Thomas.

The trial court held a permanency planning hearing on 2 December 2015. By order entered 11 January 2016, it changed Thomas' permanent plan to custody with a relative or other suitable person and transferred legal custody of the child from YFS to Aunt.[3] The court suspended further reunification efforts and released Thomas' guardian ad litem ("GAL") and the parents' attorneys. Mother filed timely notice of appeal from the permanency planning order.

I. Ceasing Reunification Efforts

[1] Mother first claims the trial court erred in ceasing reunification efforts based on its finding, "[p]ursuant to" N.C. Gen. Stat. § 7B-901(c)(1) (2015), that

> [a] court of competent jurisdiction has determined that aggravated circumstances exist because the parent has committed . . . any of the following upon the juvenile: [s]exual abuse[; c]hronic physical or emotional abuse[;] . . . [or a]ny other act, practice, or conduct that increased the enormity or added to the injurious consequences of the abuse or neglect.

3. Effective 1 July 2016, N.C. Gen. Stat. § 7B-906.2 has been amended to provide that "[c]oncurrent planning shall continue until a permanent plan has been achieved." 2016 N.C. Sess. Laws 94, §§ 12C.1.(h), 39.8 (July 14, 2016) (adding new subsection (a1) to section 7B-906.2).

She further contends that the court failed to make the finding required to cease reunification efforts under N.C. Gen. Stat. § 7B-906.1(d)(3) (2015) and that such efforts "clearly would be futile or inconsistent with the juvenile's safety and need for a safe, permanent home within a reasonable period of time." *Id.*

YFS concedes the trial court was not authorized to cease reunification efforts under N.C. Gen. Stat. § 7B-901(c) at a permanency planning hearing subsequent to the initial dispositional hearing. *See* N.C. Gen. Stat. § 7B-901 (2015) ("Initial dispositional hearing"). It argues that the court's erroneous finding under subsection 7B-901(c) is harmless, however, because its other uncontested findings support its decision to cease reunification efforts pursuant to N.C. Gen. Stat. § 7B-906.2 (2015). We will address each of the parties' arguments in turn.

"It is clear from the statutory framework of the Juvenile Code that one of the essential aims, if not the essential aim, of the dispositional hearing and the review hearing is to reunite the parent(s) and the child, after the child has been taken from the custody of the parent(s)." *In re Shue*, 311 N.C. 586, 596, 319 S.E.2d 567, 573 (1984) (interpreting prior Juvenile Code); *see also* N.C. Gen. Stat. § 7B-100(4) (2015) (announcing general policy in favor of "the return of juveniles to their homes consistent with preventing the unnecessary or inappropriate separation of juveniles from their parents"). To that end, N.C. Gen. Stat. § 7B-901(c) prescribes a narrow set of circumstances in which the trial court "shall direct that reasonable efforts for reunification . . . shall not be required" as part of its initial disposition order. *Id.* We agree with the parties that, by its placement in N.C. Gen. Stat. § 7B-901, subsection (c) has no application beyond the "[i]nitial dispositional hearing." N.C. Gen. Stat. § 7B-901.

The trial court erred by purporting to cease reunification efforts by making a finding under N.C. Gen. Stat. § 7B-901(c) at the permanency planning hearing. We note the court utilized a pre-printed form order and simply marked the boxes beside the form's language referencing N.C. Gen. Stat. § 7B-901(c). The court entered no evidentiary findings that reveal the basis for its determination. YFS adduced no evidence at the hearing that a court of competent jurisdiction had previously determined that Mother committed the acts specified in N.C. Gen. Stat. § 7B-901(c). The parties advised the court that Mother's criminal trial had not yet occurred.

Mother suggests the trial court may not cease reunification efforts without making a finding under N.C. Gen. Stat. § 7B-906.1(d)(3). Subsection 7B-906.1(d) requires the trial court to "consider" certain factors at each review hearing and permanency planning hearing after the initial disposition and to "make written findings regarding those that are relevant[.]" N.C. Gen. Stat. § 7B-906.1(d). Among these statutory factors is "[w]hether efforts to reunite the juvenile with either parent clearly would be futile or inconsistent with the juvenile's safety and need for a safe, permanent home within a reasonable period of time." N.C. Gen. Stat. § 7B-906.1(d)(3).[4] Subdivision (d)(3) further provides that "[i]f the court determines efforts would be futile or inconsistent, the court shall consider a permanent plan of care for the juvenile." *Id.*

As YFS observes, N.C. Gen. Stat. § 7B-906.1(d)(3) does not expressly authorize the ceasing of reunification efforts. Rather, upon making a finding of futility or inconsistency under the subdivision, the trial court is instructed to "consider a permanent plan of care for the juvenile." *Id.* Obviously, a court presiding at a permanency planning hearing will always consider a permanent plan of care for the juvenile and, indeed, must "adopt concurrent permanent plans and . . . identify the primary plan and secondary plan." N.C. Gen. Stat. § 7B-906.2(b) (2015); *see also* N.C. Gen. Stat. § 7B-906.1(a), (g) (2015). We interpret N.C. Gen. Stat. § 7B-906.1(d)(3) as triggering the court's duty to commence the permanent planning process as early as the initial 90-day review hearing, *see* N.C. Gen. Stat. § 7B-906.1(a) (2015), if the court is able to determine that reunification efforts "clearly would be futile or inconsistent with the juvenile's safety and need for a safe, permanent home within a reasonable period of time." N.C. Gen. Stat. § 7B-906.1(d)(3). Absent this provision, permanency planning might be needlessly delayed to the detriment of the juvenile.[5]

---

4. Effective 1 July 2016, N.C. Gen. Stat. § 7B-906.1(d)(3) is amended to provide as follows:

> Whether efforts to reunite the juvenile with either parent clearly would be *unsuccessful* or inconsistent with the juvenile's *health or* safety and need for a safe, permanent home within a reasonable time. . . . If the court determines efforts would be *unsuccessful* or inconsistent, the court shall consider *other permanent plans of care for the juvenile pursuant to G.S. 7B-906.2.*

2016 N.C. Sess. Laws 94, §§ 12C.1.(g1), 39.8 (July 14, 2016) (emphasis added). The amended language more consistently tracks the standard for discontinuing reunification as a permanent plan in N.C. Gen. Stat. § 7B-906.2(b).

5. Similarly, where the court makes a finding under N.C. Gen. Stat. § 7B-901(c) at the initial dispositional hearing that reunification efforts are not required, the court must "order a permanent plan as soon as possible, after providing each party with a reasonable opportunity to prepare and present evidence." N.C. Gen. Stat. § 7B-901(d).

See generally N.C. Gen. Stat. § 7B-906.1(a) (requiring first permanency planning hearing to be held "[w]ithin 12 months of the date of the initial order removing custody").

Where reunification efforts are not preempted as part of the initial disposition pursuant to N.C. Gen. Stat. § 7B-901(c), the trial court may cease reunification efforts at the permanency planning stage pursuant to N.C. Gen. Stat. § 7B-906.2(b), which provides as follows:

> At any permanency planning hearing, the court shall adopt concurrent permanent plans and shall identify the primary plan and secondary plan. Reunification shall remain a primary or secondary plan unless the court made findings under G.S. 7B-901(c) or *makes written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety*. The court shall order the county department of social services to make efforts toward finalizing the primary and secondary permanent plans and may specify efforts that are reasonable to timely achieve permanence for the juvenile.

Id. (emphasis added); *see also* N.C. Gen. Stat. § 7B-906.2(c) (2015) ("At the first permanency planning hearing held pursuant to G.S. 7B-906.1, the court shall make a finding about whether the efforts of the county department of social services toward reunification were reasonable, unless reunification efforts were ceased in accordance with G.S. 7B-901(c) or this section."). Thus, if reunification efforts are not foreclosed as part of the initial disposition pursuant to N.C. Gen. Stat. § 7B-901(c), the court may eliminate reunification as a goal of the permanent plan *only* upon a finding made under N.C. Gen. Stat. § 7B-906.2(b). *Cf.* N.C. Gen. Stat. § 7B-1001(a)(5) (2015) (providing a right of appeal from an order "eliminating reunification as a permanent plan" pursuant to "G.S. 7B-906.2(b)"). Only when reunification is eliminated from the permanent plan is the department of social services relieved from undertaking reasonable efforts to reunify the parent and child. *See* N.C. Gen. Stat. § 7B-906.2(c).

In the case *sub judice*, the trial court marked two boxes on the order form indicating its ceasing of reunification efforts pursuant to N.C. Gen. Stat. § 7B-901(c). Conspicuously left blank is the following pre-printed provision: "16. Pursuant to NCGS §7B-906.2(b), reunification efforts with _____ clearly would be unsuccessful or would be inconsistent

with the juvenile's health and safety."[6] As discussed above, the court had no authority to cease reunification efforts by making a finding under N.C. Gen. Stat. § 7B-901(c) at the permanency planning hearing.

We are not persuaded by YFS's suggestion that the trial court's additional findings support a ceasing of reunification efforts pursuant to N.C. Gen. Stat. § 7B-906.2(b). It is true that the order includes findings about the four factors set forth in N.C. Gen. Stat. § 7B-906.2(d) (2015), to wit:

> (d) At any permanency planning hearing under subsections (b) and (c) of this section, the court shall make written findings as to each of the following, which shall demonstrate lack of success:
>
> (1) Whether the parent is making adequate progress within a reasonable period of time under the plan.
>
> (2) Whether the parent is actively participating in or cooperating with the plan, the department, and the guardian ad litem for the juvenile.
>
> (3) Whether the parent remains available to the court, the department, and the guardian ad litem for the juvenile.
>
> (4) Whether the parent is acting in a manner inconsistent with the health or safety of the juvenile.

Id. Specifically, the court noted (1) Mother's refusal to engage in substance abuse or mental health treatment, as well as the ongoing pendency of her criminal charges, more than one year after Thomas' removal from her home; (2) her failure to attend the permanency planning hearing because she "overslept[;]" (3) her attempt to "attack" Aunt and Thomas' maternal grandmother ("Grandmother") after a Child and Family Team ("CFT") meeting on 16 November 2015; and (4) the court's belief that both "parents are acting in a manner inconsistent with the health or safety of the juvenile." "None of these findings address the ultimate finding of fact required of the trial court," under N.C. Gen. Stat. § 7B-906.2(b), *i.e.*, whether further efforts to reunify Thomas with his mother clearly would be unsuccessful or would be inconsistent with his health or safety. *In re A.E.C.*, __ N.C. App. __, __, 768 S.E.2d 166,

6. It appears the blank space on the order form allows the court to specify the parent or parents for whom reunification efforts are ceased.

171 (construing former N.C. Gen. Stat. § 7B-507(b)(1)[7]), *disc. review denied*, 368 N.C. 264, 772 S.E.2d 711 (2015). " 'This Court cannot simply infer from the findings that reunification efforts would be futile or inconsistent with the juvenile's health[or] safety . . . where the trial court was required to make *ultimate* findings specially based on a process[] of logical reasoning.' " *Id.* (second alteration in original) (emphasis in original) (quoting *In re I.R.C.*, 214 N.C. App. 358, 363-64, 714 S.E.2d 495, 499 (2011)).

In *In re L.M.T.*, 367 N.C. 165, 752 S.E.2d 453 (2013), our Supreme Court addressed the fact-finding requirement of former N.C. Gen. Stat. § 7B-507(b)(1), which allowed the trial court to cease reunification efforts if it made "written findings of fact that . . . [s]uch efforts clearly would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time[.]" *Id.* at 167, 752 S.E.2d at 455. While noting that "[s]trict adherence" to the statutory standard furthered "the Juvenile Code's dual purpose of protecting parental rights and promoting the best interests of the child," the Court held that such adherence did not require the trial court to quote the statute directly:

> While trial courts are advised that use of the actual statutory language would be the best practice, the statute does not demand a verbatim recitation of its language . . . . Put differently, *the order must make clear that the trial court considered the evidence in light of whether reunification "would be futile or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time.*" The trial court's written findings must address the statute's concerns, but need not quote its exact language.

Id. at 167-68, 752 S.E.2d at 455 (emphasis added).

We cannot determine that the trial court in fact "considered the evidence in light of" the appropriate statutory standard, given (1) its erroneous finding under N.C. Gen. Stat. 7B-901(c) that reunification efforts were not required and (2) its failure to mark the requisite finding on the pre-printed order form that, "[p]ursuant to NCGS §7B-906.2(b),

---

7. Effective 1 October 2015, N.C. Gen. Stat. § 7B-507 was amended to apply only to nonsecure custody orders entered prior to an adjudication of abuse, neglect, or dependency. 2015 N.C. Sess. Laws 136, §§ 7, 18 (July 2, 2015). Among other changes, 2015 N.C. Sess. Laws 136 deleted subsections (b)-(d) from the statute. *Id.* § 7.

reunification efforts with [Mother] clearly would be unsuccessful or would be inconsistent with [Thomas'] health and safety." *Id.* While the court's evidentiary findings may support an ultimate finding under N.C. Gen. Stat. § 7B-906.2(b), it is not the role of the reviewing court to draw inferences or make ultimate findings on the trial court's behalf. *See, e.g.*, *Quick v. Quick*, 305 N.C. 446, 451-52, 290 S.E.2d 653, 657-58 (1982). Therefore, we vacate the permanency planning order insofar as it provides that reunification efforts are not required and remand for further proceedings. *In re A.E.C.*, __ N.C. App. at __, 768 S.E.2d at 172.

II. Verification of Custodian

[2] Mother next contends the trial court violated N.C. Gen. Stat. § 7B-906.1(j) (2015) by placing Thomas in the legal custody of Aunt without verifying that she "understands the legal significance of the placement . . . and will have adequate resources to care appropriately for the juvenile." *Id.* "We have held that the trial court need not 'make any specific findings in order to make the verification' under" subsection (j). *In re J.H.*, __ N.C. App. __, __, 780 S.E.2d 228, 240 (2015) (quoting *In re J.E.*, *B.E.*, 182 N.C. App. 612, 616-17, 643 S.E.2d 70, 73 (2007)). "But the record must contain competent evidence of the [custo]dians' financial resources and their awareness of their legal obligations." *Id.*

The trial court received competent evidence that Aunt understood the legal significance of Thomas' placement in her custody. YFS submitted a written report conveying Aunt's "desire to provide permanence for her nephew until he [is] able to be reunited with his mother" and recommending that Aunt be granted custody of Thomas. The GAL recommended awarding guardianship to Aunt and reported that "Aunt expressed interest in permanent guardianship." The court confirmed that the YFS social worker had "talked with [Aunt] in detail about" the alternative recommendations of custody and guardianship. The social worker explained YFS's rationale for recommending an award of custody to Aunt rather than guardianship, in that "when [Mother's] criminal matter is resolved . . . , if she done everything that she needs to do, it's possible that she can maintain custody of [Thomas]. And her family was in agreement if she was at a place where she could get custody back of her son, when the criminal matter is taken care of." Aunt affirmed to the court that she understood Mother might be able to regain custody of Thomas if warranted by future circumstances. The court entered findings consistent with this evidence. While it did not expressly find that Aunt "understands the legal significance" of having legal custody of Thomas, we hold the court properly verified her understanding for purposes of N.C. Gen. Stat. § 7B-906.1(j). *See In re J.E.*, *B.E.*, 182 N.C.

App. at 617, 643 S.E.2d at 73; *see also In re L.M.*, 238 N.C. App. 345, 347, 767 S.E.2d 430, 432 (2014) ("It is sufficient that the court receives and considers evidence that the guardians understand the legal significance of the guardianship.").

We agree with Mother that the court did not receive sufficient evidence to verify the adequacy of Aunt's resources under N.C. Gen. Stat. § 7B-906.1(j). YFS reported that Thomas had "been successfully maintained in the home of [Aunt] for the past ten months." However, this fact alone is insufficient to support a verification under subsection (j). *See In re J.H.*, __ N.C. App. at __, 780 S.E.2d at 240 (deeming ten-month "successful kinship placement" with grandparents insufficient to demonstrate adequacy of grandparents' resources). The GAL described Aunt's home as "very clean" and reported that Thomas "has his own room" but further reported that Aunt was unemployed and "stated that she needs more financial support for [Thomas]." Although Aunt had been awarded unemployment compensation benefits at the time of the hearing, she told the court that she had yet to find employment and was "just continuously looking for jobs." She credited Grandmother and Great-Grandmother for providing "additional support" and "assistance" in caring for Thomas. Such vague assurances do not suffice to allow an "independent determination" by the court, "based upon the facts in the particular case, that the resources available to the potential [custodian] are in fact 'adequate' " for purposes of N.C. Gen. Stat. § 7B-906.1(j). *See In re P.A.*, __ N.C. App. __, __, 772 S.E.2d 240, 248 (2015). Accordingly, we vacate the award of legal custody to Aunt and remand for further proceedings. *Id.*

III. Visitation

[3] Mother also challenges the trial court's order that she have no contact with Thomas. She contends the court failed to make the necessary findings of fact required to deprive a parent of her right to visitation under N.C. Gen. Stat. § 7B-905.1(c) (2015). We find no merit to this claim.

"An order that . . . continues the juvenile's placement outside the home shall provide for appropriate visitation as may be in the best interests of the juvenile consistent with the juvenile's health and safety." N.C. Gen. Stat. § 7B-905.1(a) (2015). The order must establish an adequate visitation plan for the parent " '[i]n the absence of findings that the parent has forfeited their right to visitation *or that it is in the child's best interest to deny visitation*[.]' " *In re T.H.*, 232 N.C. App. 16, 34, 753 S.E.2d 207, 219 (2014) (quoting *In re E.C.*, 174 N.C. App. 517, 522-23, 621 S.E.2d 647, 652 (2005) (emphasis added)). We review an order denying

visitation to a respondent-parent only for abuse of discretion. *In re C.M.*, 183 N.C. App. 207, 215, 644 S.E.2d 588, 595 (2007).

The permanency planning order includes findings of fact, made "upon clear, cogent and convincing evidence" and in light of "the best interest of the child," that both supervised and unsupervised visitation between Mother and Thomas are "not desirable." The court made additional findings that Mother was awaiting trial on criminal charges for her alleged sexual abuse of Thomas, that she was "noncompliant with mental health treatment and substance abuse treatment services," and that she was "acting in a manner inconsistent with the health and safety of the juvenile." The court received evidence that Mother remained subject to a no contact order in her criminal case and had disrupted YFS's attempt to develop a visitation plan for her, subject to the resolution of her criminal case, at the most recent CFT meeting. We hold that the court made the necessary findings to deny visitation to Mother and that it acted well within its discretion in doing so.

Mother also objects to the trial court's decree that "[a]ny future contact allowed by [Aunt] shall be therapeutically guided." Because we affirm the trial court's denial of visitation by Mother, any condition for future visitation is merely hypothetical until such time the court removes the no contact order. Therefore we find Mother's argument that the court improperly delegated its judicial function to Thomas' Aunt is moot.

IV. Waiver of Review Hearings

[4] Finally, Mother claims the trial court erred by waiving further review hearings without making the findings of fact required by N.C. Gen. Stat. § 7B-906.1(n) (2015), to wit:

> (1) The juvenile has resided in the placement for a period of at least one year.
>
> (2) The placement is stable and continuation of the placement is in the juvenile's best interests.
>
> (3) Neither the juvenile's best interests nor the rights of any party require that review hearings be held every six months.
>
> (4) All parties are aware that the matter may be brought before the court for review at any time by the filing of a motion for review or on the court's own motion.

> (5) The court order has designated the relative or other suitable person as the juvenile's permanent custodian or guardian of the person.

Id. Absent a waiver under subsection (n), N.C. Gen. Stat. § 7B-906.1(a) requires that "subsequent permanency planning hearings shall be held at least every six months [after the initial permanency planning hearing] . . . to review the progress made in finalizing the permanent plan for the juvenile, or if necessary, to make a new permanent plan for the juvenile."[8] *Id.* If the trial court waives these hearings, it "must make written findings of fact satisfying each of the enumerated criteria listed in N.C. Gen. Stat. § 7B-906.1(n), and its failure to do so constitutes reversible error." *In re P.A.*, __ N.C. App. at __, 772 S.E.2d at 249.

It is undisputed the court did not make findings under N.C. Gen. Stat. § 7B-906.1(n). If on remand the court chooses to waive subsequent permanency planning hearings, it must comply with this requirement. *See In re R.A.H.*, 182 N.C. App. 52, 62, 641 S.E.2d 404, 410 (2007).

V. Conclusion

We vacate the provisions of the permanency planning order ceasing reunification efforts, eliminating reunification as a permanent plan, and placing Thomas in the legal custody of Aunt. We remand for further proceedings consistent with N.C. Gen. Stat. § 7B-906.2(b) and (j). The order is affirmed insofar as it denies visitation to Mother.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Judges CALABRIA and STROUD concur.

---

8. "Review hearings after the initial permanency planning hearing [are] designated as subsequent permanency planning hearings." N.C. Gen. Stat. § 7B-906.1(a).

IN RE TIMBERLAKE

[250 N.C. App. 80 (2016)]

IN THE MATTER OF WESLEY MARSHALL TIMBERLAKE

No. COA15-1202

Filed 18 October 2016

Sexual Offenders—sex offender registration—improper reconsideration

The trial court erred by reconsidering the termination of defendant's sex offender registration and in entering an amended order. The trial court lacked jurisdiction to reconsider petitioner's request to terminate his registration requirement after the State did not oppose termination during the initial hearing and did not appeal the initial order.

Appeal by petitioner from order entered 8 May 2015 by Judge R. Allen Baddour, Jr., in Franklin County Superior Court. Heard in the Court of Appeals 13 April 2016.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender James R. Grant, for petitioner-appellant.

Attorney General Roy Cooper, by Assistant Attorney General William P. Hart, Jr., for the State.

McCULLOUGH, Judge.

Wesley Marshall Timberlake ("petitioner") appeals from an amended order denying his petition to terminate sex offender registration. For the following reasons, we vacate the amended order.

I. Background

Petitioner was convicted of assault with intent to commit second-degree criminal sexual conduct in South Carolina on 16 November 1995. Upon his release from prison, petitioner moved to North Carolina and first registered as a sex offender on 2 March 2004.

On 10 June 2014, petitioner filed a petition for termination of his sex offender registration in Franklin County. The matter first came on for hearing in Franklin County Superior Court before the Honorable R. Allen Baddour, Jr., on 6 October 2014. Defendant appeared *pro se* and presented affidavits in support of his petition. When the court inquired if the State would like to say anything, an Assistant District Attorney

("ADA") simply replied, "[n]othing from the State, Judge." The judge then informed petitioner that his motion would be allowed and entered an order terminating petitioner's sex offender registration. Among the findings in the order, the judge checked box seven, indicating "[t]he relief requested by the petitioner complies with the provisions of the federal Jacob Wetterling Act, 42 U.S.C. § 14071, as amended, and any other federal standards applicable to the termination of a registration requirement . . . ."

On 16 October 2014, an Assistant Attorney General ("AAG") representing the North Carolina Division of Criminal Information ("DCI"), which is tasked with removing registered sex offenders from the State registry, wrote to the trial judge concerning the termination of petitioner's sex offender registration. The AAG explained that "[p]etitioner's conviction for assault with intent to commit second-degree criminal sexual conduct might be a tier III offense as defined by federal law[]" and "[t]ier III offenders must register for life." Thus, the AAG specifically requested that the court review finding number seven. The AAG further indicated that "[i]f [DCI did] not receive any response by 1 November 2014, DCI shall proceed with termination of the petitioner's registration as directed by the 6 October 2014 order."

On 8 May 2015, the matter came back on for hearing before the Honorable R. Allen Baddour, Jr. At the hearing, an ADA, but not the same ADA that appeared at the initial hearing, reiterated the AAG's concerns and petitioner, again appearing *pro se*, expressed his frustration with the registration requirements. Upon hearing from both sides, the judge explained to petitioner that "it would not comply with federal law to allow you to come off the registry because of the nature of the offense for which you were convicted." The trial judge then entered an "Amended-Corrected" order denying petitioner's petition for termination of sex offender registration. The judge noted on the order that "[t]his order corrects a prior erroneous conclusion of law regarding compliance with the federal Jacob Wetterling Act."

Defendant gave notice of appeal in open court and indicated he wanted an attorney assigned. The judge noted the appeal and appointed the Appellate Defender, who later assigned counsel on 4 June 2015.

On 6 November 2015, petitioner's appellate counsel filed a petition for writ of certiorari noting petitioner's failure to file written notice of appeal and requesting that this Court review the matter despite the error. By a 23 March 2016 order, this Court granted certiorari.

II. Discussion

On appeal, petitioner argues the trial court erred in reconsidering the termination of his sex offender registration and in entering the amended order. In support of his argument, defendant asserts that (1) the State waived review by failing to appeal the initial order, (2) the doctrines of res judicata and collateral estoppel prohibit reconsideration of the matter, (3) the trial court lacked subject matter jurisdiction to conduct the 8 May 2015 hearing and to enter the amended order, and (4) the entry of the amended order violated his rights to procedural due process. Defendant's contentions raise issues of law, which this Court reviews *de novo*.

Upon review, we agree that the trial court lacked jurisdiction to reconsider petitioner's request to terminate his registration requirement after the State did not oppose termination during the initial hearing and did not appeal the initial order.

We begin our analysis with the pertinent law. N.C. Gen. Stat. § 14-208.12A concerns a registered sex offender's request for termination of a registration requirement and provides, in pertinent part, as follows:

> (a) Ten years from the date of initial county registration, a person required to register . . . may petition the superior court to terminate the 30-year registration requirement if the person has not been convicted of a subsequent offense requiring registration . . . .
>
> . . . .
>
> (a1) The court may grant the relief if:
>
> (1) The petitioner demonstrates to the court that he or she has not been arrested for any crime that would require registration under this Article since completing the sentence,
>
> (2) The requested relief complies with the provisions of the federal Jacob Wetterling Act, as amended, and any other federal standards applicable to the termination of a registration requirement or required to be met as a condition for the receipt of federal funds by the State, and
>
> (3) The court is otherwise satisfied that the petitioner is not a current or potential threat to public safety.

> (a2) The district attorney in the district in which the petition is filed shall be given notice of the petition at least three weeks before the hearing on the matter. The petitioner may present evidence in support of the petition and the district attorney may present evidence in opposition to the requested relief or may otherwise demonstrate the reasons why the petition should be denied.

N.C. Gen. Stat. § 14-208.12A (2015).

In the present case, it appears petitioner followed the statutory procedure to initiate the termination proceedings and demonstrated to the trial court's satisfaction during the 6 October 2014 hearing that he met the requirements to have his sex offender registration terminated. When the trial court inquired whether the State had anything to say in response to the petition, the ADA chose not to put on any evidence or argue in opposition to termination, simply stating, "[n]othing from the State, Judge."

Petitioner now equates the State's failure to argue against the termination with consent to the termination of his sex offender registration and contends the State waived review by failing to exercise its statutory right to contest the petition and by failing to appeal. While we do not agree with petitioner's characterization of the State's failure to object as consent resulting in invited error, upon review of the record, it is clear to this Court that the State failed to take advantage of the statutorily prescribed processes for challenging the termination of petitioner's sex offender registration – both by failing to "present evidence in opposition to the requested relief or . . . demonstrate the reasons why the petition should be denied[,]" as provided in N.C. Gen. Stat. § 14-208.12A(a2), and by failing to appeal from the trial court's order, as allowed in N.C. Gen. Stat. § 7A-27.

As detailed above, the AAG instead wrote a letter to the trial judge asking him to review the termination of petitioner's sex offender registration. As petitioner points out, that letter failed to meet the requirements of a notice of appeal, *see* N.C. R. App. P. 3, or a motion for reconsideration pursuant to N.C. Gen. Stat. § 1A-1, Rules 59(a)(8) or 60(b). *See Chicopee, Inc. v. Sims Metal Works, Inc.*, 98 N.C. App. 423, 431, 391 S.E.2d 211, 216 (1990) ("Erroneous judgments may be corrected only by appeal, and a motion under [Rule 60] cannot be used as a substitute for appellate review."), *Davis v. Davis*, 360 N.C. 518, 522, 631 S.E.2d 114, 118 (2006) ("In order to obtain relief under Rule 59(a)(8), a defendant must show a proper objection at trial to the alleged error of law giving

rise to the Rule 59(a)(8) motion."). While it is likely the State was hesitant to appeal the termination order because appeals in similar termination of sex offender registration cases have been dismissed for failure of the State to preserve the issue by contesting termination below, *see In re Hutchinson*, 218 N.C. App. 443, 445-46, 723 S.E.2d 131, 132-33, *disc. rev. denied*, __ N.C. __, 724 S.E.2d 910 (2012), *In re Bunch*, 227 N.C. App. 258, 261-62, 742 S.E.2d 596, 598-99, *disc. rev. denied*, 367 N.C. 224, 747 S.E.2d 541 (2013), the State may not circumvent those holdings by seeking review by the trial court in a process not authorized by statute.

The State argues the trial court's review of the termination of defendant's sex offender registration was appropriate in this case, likening it to expunction cases in which this Court has overruled the trial court's initial expunction of criminal records after the State's motions for reconsideration were denied by the trial court. *See In re Expungement for Kearney*, 174 N.C. App. 213, 620 S.E.2d 276 (2005) (holding the trial court, notwithstanding the absence of the judge authoring the expungement order from the bench due to retirement, had jurisdiction to consider a motion for reconsideration of an order for expungement), *State v. Frazier*, 206 N.C. App. 306, 697 S.E.2d 467 (2010) (holding the trial court erred in ordering expunction, but did not otherwise address whether the trial court properly considered the motion for reconsideration). The State contends that this Court impliedly determined in those cases that there were no jurisdictional limits which would preclude the trial court from reconsidering the prior expungement orders.

While that may be the case in expungement cases, expungement is not directly analogous to termination of sex offender registration. Moreover, those cases are distinguishable from the present case in one key respect – in both *Kearny* and *Frazier*, the State filed motions for reconsideration. There was no such motion in the present case, but instead the extrajudicial letter from the AAG tasked with removing petitioner from the sex offender registry for the DCI to the trial judge requesting review. We hold such letter does not comply with the processes provided in our general statutes and did not vest the trial court with jurisdiction to review the termination order for errors of law.

III. Conclusion

For the reasons, discussed, we vacate the trial court's "Amended-Corrected" order entered 8 May 2015.

VACATED.

Judges ELMORE and INMAN concur.

N.C. STATE BAR v. SUTTON

[250 N.C. App. 85 (2016)]

THE NORTH CAROLINA STATE BAR, PLAINTIFF
v.
DAVID C. SUTTON, ATTORNEY, DEFENDANT

No. COA15-1198

Filed 18 October 2016

1. Attorneys—discipline by the State Bar—suspension of law license—constitutional and procedural challenges

Where the Disciplinary Hearing Commission (DHC) of the North Carolina State Bar entered an order of discipline suspending defendant's law license for a period of five years after determining that he had committed numerous violations of the North Carolina Rules of Professional Conduct, the Court of Appeals rejected various constitutional and procedural arguments made by defendant on appeal, relating to the constitutionality of the DHC's disciplinary authority, due process, freedom of speech, the right to counsel, an amendment to the complaint by the State Bar, the signatures on the complaints, the notice of factors to be considered at the dispositional phase, the adequacy of the findings and conclusions at the dispositional phase, and the assessment of fees and costs.

2. Attorneys—discipline by the State Bar—suspension of law license—challenges to findings and conclusions

Where the Disciplinary Hearing Commission (DHC) of the North Carolina State Bar entered an order of discipline suspending defendant's law license for a period of five years after determining that he had committed numerous violations of the North Carolina Rules of Professional Conduct, the Court of Appeals rejected various challenges by defendant to the validity of certain findings of fact and conclusions of law made by the DHC.

Appeal by defendant from order entered 13 November 2014 by the Disciplinary Hearing Commission of the North Carolina State Bar. Heard in the Court of Appeals 25 April 2016.

The North Carolina State Bar, by Deputy Counsel Carmen Hoyme Bannon and Deputy Counsel David R. Johnson, for plaintiff-appellee.

David C. Sutton, pro se, for defendant-appellant.

DAVIS, Judge.

David C. Sutton ("Defendant") appeals from an order of discipline entered by the Disciplinary Hearing Commission (the "DHC") of the North Carolina State Bar suspending his law license for a period of five years after determining that he had committed numerous violations of the North Carolina Rules of Professional Conduct. In addition to asserting challenges to various constitutional and procedural aspects of his disciplinary proceeding, Defendant argues on appeal that a number of the DHC's findings of fact were not supported by evidence in the record and that several of its legal conclusions were incorrect. After careful review, we affirm.

Factual Background

The State Bar initiated this disciplinary proceeding by filing a complaint on 3 April 2013. At all relevant times, Defendant, who was admitted to the North Carolina Bar in 2001, was engaged in the practice of law and maintained an office in Greenville, North Carolina. Defendant's disciplinary proceeding concerned allegations of misconduct by him that spanned multiple years and involved his representation of clients in a number of different cases.

The matter was assigned to a hearing panel of the DHC on 23 April 2013. After an earlier amended complaint was filed, the DHC permitted the State Bar to file its second amended complaint on 4 December 2014.

Disciplinary proceedings are divided into two phases: (1) the adjudicatory phase, during which the DHC determines whether the defendant has committed misconduct; and (2) the dispositional phase, during which the DHC determines the appropriate sanction for any misconduct that was found to exist. *N.C. State Bar v. Talford*, 356 N.C. 626, 636, 576 S.E.2d 305, 312 (2003). The DHC received evidence and heard arguments in connection with the adjudicatory phase of the proceeding from 5–9 May and 9–11 June 2014. On 8 August 2014, the DHC issued its final findings and conclusions relating to the adjudicatory phase in which it determined that Defendant had committed 28 separate violations of the Rules of Professional Conduct.[1]

The allegations against Defendant stemmed from his actions in seven specific matters during the course of his practice of law. The

1. The DHC had issued an initial version of its findings and conclusions regarding the adjudicatory phase on 18 July 2014. The DHC subsequently released a corrected version of these findings and conclusions on 8 August 2014.

following is an overview of the facts relating to these matters and the accompanying findings of misconduct made by the DHC in connection with each of them.

I. The Pollard Matter

Defendant represented Barbara Pollard in a wrongful death lawsuit against her daughter-in-law in connection with the 2005 death of Pollard's son, Stacey Pollard. During Pollard's May 2011 deposition, which was taken by attorney Kathryn Fagan, Defendant repeatedly interjected his own questions and commentary, made sarcastic remarks, coached Pollard on how to respond to particular questions, and answered questions for Pollard. After the deposition had concluded, Defendant stated — in the presence of his client, the court reporter, and a law student in attendance — "Fagan, you know what your problem is? Your problem is that you need a boyfriend or a husband or something. . . . I understand your client goes both ways so . . . maybe you could have a little lickety-lick with her."[2]

In connection with Defendant's representation of Pollard, a website (justice4stacey.com) was created in July 2007 to solicit information from members of the public who may have had knowledge relating to the death of Pollard's son. News articles were also posted on the website, and there was a section where members of the public could post public comments.

In August 2011, Fagan filed a motion for a change of venue based on what she characterized as the "vilification" of her client resulting from the website, which she asserted was "sponsored" by Defendant. In response, Defendant filed an affidavit in which he falsely stated that he "did not 'sponsor' any website[.]" Defendant made this representation despite the fact that he (1) had taken part in discussions with Pollard's family regarding setting up the website; (2) was the initial registrant and administrator of the website and paid the web hosting fees; (3) possessed the password necessary to post materials on the website and did, in fact, post certain items; and (4) was listed as the website's contact person along with his email address and phone number.[3]

---

2. The DHC concluded that these actions violated Rule 3.5(a)(4) (conduct intended to disrupt a tribunal), Rule 8.4(d) (conduct prejudicial to the administration of justice), and Rule 4.4(a) (using means that have no substantial purpose other than to embarrass or burden a third person).

3. The DHC concluded that Defendant's misrepresentation regarding his sponsorship of the website violated Rule 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation) and Rule 8.4(d) (conduct prejudicial to the administration of justice).

II. The Langston Matter

In 2011, Defendant represented Rita Langston in a family law case in which the opposing counsel was Brantley Peck, Jr. During Langston's May 2011 deposition, Defendant repeatedly interrupted Peck's questioning, provided testimony for Langston, and interjected his own questions. Defendant also accused Peck during the deposition of being "complicit" with theft and referred to one of Peck's statements as "a damn lie." Shortly after this attack, Defendant abruptly terminated the deposition and refused to allow Peck to complete his deposition of Langston.[4]

Approximately one year later, Defendant made two false statements in connection with the Langston Matter. First, Defendant informed the court that a corporation formed by the parties in the case had been "annulled" by North Carolina's Secretary of State because the opposing party had forged corporate documents. In reality, Defendant knew that the corporation had been administratively dissolved by the Secretary of State rather than dissolved because of fraud. Second, Defendant accused opposing counsel in open court of "slipping" a handwritten provision into a settlement agreement without Defendant's knowledge or approval when, in fact, Defendant knew about — and had actually agreed to — the added provision.[5]

III. The Gorham Matter

During a trial in Greene County Superior Court in 2012 at which Defendant was representing a defendant charged with murder, Judge Phyllis Gorham admonished Defendant for repeatedly failing to display respect for the court and to yield to its rulings. Later in the trial, with the jury present in the courtroom, Defendant approached the bench without having received permission and in a "loud and argumentative" tone accused the prosecutor of attempting to offer inadmissible evidence. He then noticeably grimaced at Judge Gorham. This behavior necessitated Judge Gorham calling a recess in order to address Defendant's behavior.[6]

---

4. The DHC concluded that Defendant's actions during this deposition violated Rule 3.4(c) (knowingly disobeying an obligation under the rules of a tribunal), Rule 3.5(a)(4) (conduct intended to disrupt a tribunal), and Rule 8.4(d) (conduct prejudicial to the administration of justice).

5. The DHC concluded that these misrepresentations violated Rule 8.4(c) (conduct involving dishonesty, deceit or misrepresentation), Rule 8.4(d) (conduct prejudicial to the administration of justice), and Rule 3.3(a)(1) (making a false statement of material fact to a tribunal).

6. The DHC concluded that Defendant's behavior before Judge Gorham violated Rule 3.4(c) (knowingly disobeying an obligation under the rules of a tribunal), Rule 8.4(d)

IV. The Davenport Matter

In 2012, Defendant represented Jonathan Davenport in a dispute arising from a previous business relationship between Davenport and Billy Roughton. Davenport was ultimately charged by state and federal authorities with crimes arising from this business relationship. Defendant recorded, and then uploaded to YouTube, a video of an incident in which he confronted Pasquotank County Sheriff's Office Investigator Sam Keith, the investigating officer in Davenport's case, and accused the Sheriff's Office of engaging in criminal conduct by not handing over certain property to Davenport. Defendant later admitted that his purpose in uploading the video to YouTube was not to further his representation of Davenport but rather to be a "smart aleck."[7]

The following day, Defendant sent a letter on behalf of Davenport directly to Roughton and the Sheriff of Pasquotank County accusing them of conspiring to violate Davenport's rights and engaging in malicious prosecution. At the time Defendant sent this letter — in which he demanded $3 million to settle the matter — he knew that both Roughton and the sheriff were represented by counsel.[8]

V. The Shackley Matter

In 2013, Defendant represented Norman Shackley on a charge of impersonating a law enforcement officer. In connection with the case, Defendant obtained by subpoena phone records from one of the State's witnesses, Jimmy Hughes. At 10:00 p.m. one evening, Defendant called a phone number listed in these records and told the person who answered the phone, Jean Sugg (whom Defendant did not know), that Hughes had "hit on" Shackley's wife, who had "big boobs" and ran a prostitute website.[9]

(conduct prejudicial to the administration of justice), and Rule 3.5(a)(4)(B) (conduct intended to disrupt a tribunal).

7. The DHC concluded that these actions violated Rule 4.4(a) (using means in representing a client that have no substantial purpose other than to embarrass or burden a third person).

8. The DHC concluded that Defendant's actions in sending the letter violated Rule 4.2 (communicating with persons known to be represented by counsel).

9. The DHC concluded that this conduct violated Rule 4.4(a) (using means in representing a client that have no substantial purpose other than to embarrass or burden a third person).

VI. The Dolenti Matter

Defendant defended a client charged with child abuse in 2013. Upon learning that the district attorney had refused to drop the charges against his client, Defendant left a voicemail for Detective Nikki Dolenti, the investigating officer in the case, in which he made the following statement in a harsh and threatening tone: "You obviously don't know what the hell you're doing. So I'm just gonna whoop your ass real bad next week unless you get your ass down there and get this case dismissed. And do your job and have some sense."[10]

VII. The Deans Matter

Defendant was arrested by the Pitt County Sheriff's Office as a result of his voicemail to Detective Dolenti. At the time, Defendant was representing the Pitt County Sheriff's daughter, Laura Deans, and son-in-law in an adoption proceeding that was set to be finalized within the month. Defendant, who was "mad as hell" and "wanted to get back at the [Sheriff]," left a voicemail with Deans stating that he had been handling her case "as a favor to your dad when I thought that he wasn't trying to f*** me too, but I can't do that anymore, and I don't know that you need to be in my office or I need to have y'all around." Defendant also made explicit and crude comments during the voicemail regarding the sheriff, his wife, and the Pitt County district attorney.[11]

During a subsequent phone call with Deans, Defendant demanded immediate payment of his fee — despite the lack of a prior agreement as to when his fee would be due — and refused to respond to Deans' questions regarding the status of the adoption or the steps she needed to take to finalize the adoption. Defendant ceased work on the case and did not have any further interaction with Deans.[12]

---

10. The DHC concluded that this conduct violated Rule 4.4(a) (using means in representing a client that have no substantial purpose other than to embarrass or burden a third person) and Rule 8.4(d) (conduct prejudicial to the administration of justice).

11. The DHC concluded that Defendant's statements on the voicemail violated Rule 4.4(a) (using means in representing a client that have no substantial purpose other than to embarrass or burden a third person).

12. The DHC concluded that by virtue of his actions with regard to Deans' case, Defendant violated Rules 8.4(a) and (g) (attempting to intentionally prejudice a client during the course of the professional relationship), Rule 1.16(d) (failing to take reasonably practicable steps to protect a client's interests upon termination of the representation), Rule 1.4(a) (failing to comply with a reasonable request for information), and Rule 1.4(b) (failing to explain a matter to the extent reasonably necessary to permit a client to make informed decisions about the representation).

* * * *

After determining in its 8 August 2014 order that Defendant had violated the Rules of Professional Conduct in connection with the seven matters summarized above, the DHC held hearings from 16–18 September and 22–23 October 2014 for the dispositional phase of the proceeding during which it received additional evidence and heard arguments. On 13 November 2014, the DHC issued its Order of Discipline — upon which the present appeal is based — in which it (1) recited the violations of the Rules of Professional Conduct it had found in its 8 August 2014 order; (2) made additional findings of fact relating to the dispositional phase; and (3) imposed a five-year suspension of Defendant's law license.

The extensive additional findings of fact in the Order of Discipline relating to the dispositional stage described numerous other instances of abusive, belligerent, threatening, and profane communications and conduct by Defendant — both inside and outside of the courtroom — that occurred between 2008 and 2014.[13] The Order of Discipline also noted numerous examples of

> a recurrent pattern in Defendant's practice of law. When Defendant believes someone with whom he interacts professionally is wrong about the facts, the law, procedure, or a matter of judgment, he demands instant redress. If the person with whom he disagrees does not immediately capitulate, Defendant threatens to harm that individual in some way.

The Order of Discipline further noted numerous incidents demonstrating Defendant's penchant for "us[ing] graphic sexual commentary to embarrass and/or demean others in professional contexts." It also cited numerous instances showing that "in retaliation for perceived

13. These additional incidents included, without limitation, Defendant referring to the Pasquotank County Attorney as an "idiot" who made "asinine" assertions and "should be ashamed of himself"; accusing attorney Shearin of engaging in "Gestapo tactics"; acting "disruptive and disrespectful" to a Superior Court judge in Hertford County and accusing the district attorney in that case — in front of a jury — of lying; accusing another assistant district attorney of being "mentally ill" and a "f***ing Nazi" and stating to him, "I am telling you this son, and I can call you son because that's what you deserve to be called, if I didn't have a bar license, you would be a greasy spot on that table"; referring to the Greensboro Police Chief alternatively as "Mohammed," "Sahheb," and "Ahmed" when his name was actually Hassan Aden; and ordering a Superior Court judge — in open court and in the presence of the public — to "wipe the smirk off [his] face."

wrongs, [Defendant] is willing to breach his duty of loyalty to clients and former clients by disclosing confidential information and/or attempting to prejudice their interests." Finally, the Order of Discipline stated that

> [t]here is no indication that Defendant has taken ownership of his misconduct or its consequences. He has not acknowledged violating the Rules of Professional Conduct, expressed remorse, or shown any insight regarding his lack of professionalism. In his testimony during the discipline phase of this case, Defendant maintained that he didn't do anything wrong, has nothing to apologize for, and will continue to conduct himself in the same manner if permitted to continue practicing law.

Defendant filed a timely notice of appeal on 10 December 2014.

Analysis

Defendant raises a variety of arguments on appeal, which can be organized into two general categories. First, he makes several constitutional and procedural arguments in connection with his disciplinary proceeding and the Order of Discipline. Second, he challenges the validity of certain findings of fact and conclusions of law made by the DHC in determining that he had violated the Rules of Professional Conduct. We address each category below.

I. Standard of Review

Pursuant to N.C. Gen. Stat. § 84-28, the DHC has the power to discipline any attorney admitted to practice law in the State of North Carolina upon determining that the attorney has violated the North Carolina Rules of Professional Conduct. N.C. Gen. Stat. § 84-28(b)(2) (2015). A party may appeal to this Court from a final order of the DHC. N.C. Gen. Stat. § 84-28(h).

We review disciplinary orders of the DHC under the whole record test, which

> requires the reviewing court to determine if the DHC's findings of fact are supported by substantial evidence in view of the whole record, and whether such findings of fact support its conclusions of law[.] Such supporting evidence is substantial if a reasonable person might accept it as adequate backing for a conclusion.

Talford, 356 N.C. at 632, 576 S.E.2d at 309-10 (internal citation and quotation marks omitted). "Moreover, in order to satisfy the evidentiary

requirements of the whole-record test in an attorney disciplinary action, the evidence used by the DHC to support its findings and conclusions must rise to the standard of clear, cogent, and convincing." *Id.* at 632, 576 S.E.2d at 310 (citation, quotation marks, and brackets omitted).

The whole record test also mandates that "the reviewing court must take into account any contradictory evidence or evidence from which conflicting inferences may be drawn." *Id.* However, "[t]he mere presence of contradictory evidence does not eviscerate challenged findings, and the reviewing court may not substitute its judgment for that of the DHC. The DHC determines the credibility of the witnesses and the weight of the evidence." *N.C. State Bar v. Adams*, __ N.C. App. __, __, 769 S.E.2d 406, 411 (2015) (internal citation, quotation marks, and brackets omitted). Thus, "[t]he whole record test does not allow the reviewing court to replace the [DHC's] judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*." *N.C. State Bar v. Nelson*, 107 N.C. App. 543, 550, 421 S.E.2d 163, 166 (1992) (citation and quotation marks omitted), *aff'd per curiam*, 333 N.C. 786, 429 S.E.2d 716 (1993).

II. Constitutional and Procedural Arguments

A. Constitutionality of the DHC's Disciplinary Authority

[1] Defendant asserts that the Order of Discipline is null and void because the "DHC encroaches on the judiciary and violates separation of powers" principles. In making this argument, Defendant directs our attention to Article III, Section 11 of the North Carolina Constitution, which states that

> all administrative departments, agencies, and offices of the State and their respective functions, powers, and duties shall be allocated by law among and within not more than 25 principal administrative departments so as to group them as far as practicable according to major purposes. Regulatory, quasi-judicial, and temporary agencies may, but need not, be allocated within a principal department.

N.C. Const. art. III, § 11. He then points to Article IV, Section 3, which provides that the "General Assembly may vest in administrative agencies established pursuant to law such judicial powers as may be reasonably necessary as an incident to the accomplishment of the purposes for which the agencies were created." N.C. Const. art. IV, § 3.

Defendant contends that the State Bar — through the DHC — may not constitutionally exercise judicial power because it is not housed in

one of the 25 principal departments referenced in Article III, Section 11. However, Defendant provides no authority for this assertion, and we fail to see how it *could* be supported, given that the same constitutional language he relies upon specifically states that "[r]egulatory [and] quasi-judicial . . . agencies may, *but need not*, be allocated within a principal department."[14] N.C. Const. art. III, § 11 (emphasis added).

We also find meritless Defendant's contention that the State Bar impermissibly encroaches on the power of North Carolina's Judicial Branch to impose discipline in cases involving attorney misconduct. Our Supreme Court has specifically held that the State Bar and the courts of North Carolina "share concurrent jurisdiction over matters of attorney discipline" and that "questions relating to the propriety and ethics of an attorney are ordinarily for the consideration of the North Carolina State Bar." *N.C. State Bar v. Randolph*, 325 N.C. 699, 701, 386 S.E.2d 185, 186 (1989) (citation omitted). That concurrent jurisdiction does not undermine the "inherent powers of a court to deal with its attorneys." *Id.* (citation omitted). This Court has explained that

> under the system of concurrent jurisdiction over attorney conduct and discipline in effect in North Carolina, both the State Bar and the courts have an important role to play in assuring that attorneys conduct themselves properly, with the courts focusing on protecting themselves from fraud and impropriety and serving the ends of the administration of justice, while the State Bar has responsibility for the broad range of questions relating to the propriety and ethics of an attorney, and with neither to act in such a manner as to disable or abridge the powers of the other.

Cunningham v. Selman, 201 N.C. App. 270, 284, 689 S.E.2d 517, 526 (2009) (internal citations, quotation marks, and brackets omitted).

Defendant provides no basis for his assertion that the State Bar's actions in the present case usurped the role of North Carolina's judiciary in regulating attorney misconduct. Accordingly, we overrule Defendant's argument on this issue.

---

14. In his brief, Defendant cites to *N.C. State Bd. of Dental Examiners v. F.T.C.*, __ U.S. __, 135 S. Ct. 1101, 191 L. Ed. 2d 35 (2015), a case considering whether the North Carolina Board of Dental Examiners was entitled to immunity from suit under federal antitrust law. However, he fails to demonstrate how that case is relevant to the present action.

B. Due Process

In his brief, Defendant makes the sweeping assertion that the entire disciplinary "process was biased and void of fairness and due process and must be vacated." In support of this contention, Defendant expresses his disagreement with various witnesses' testimony, actions of the State Bar, statements of DHC members, and rulings of the DHC.

However, because Defendant fails to provide any substantive arguments or legal authority supporting his contention that the proceeding as a whole violated his right to due process on account of bias or unfairness, we deem this issue abandoned pursuant to Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure. *See* N.C. R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned."); *N.C. State Bar v. Ethridge*, 188 N.C. App. 653, 668, 657 S.E.2d 378, 387 (2008) ("[D]efendant fails to cite any authority for his assignments of error regarding DHC's failure to properly weigh the aggravating and mitigating factors. As such, these assignments of error are deemed abandoned pursuant to N.C.R. App. P. 28(b)(6)[.]").

Moreover, based on our own thorough review of the extensive record in this case, we are satisfied that the DHC conducted a fair and unbiased process that fully comported with principles of due process. Defendant was given proper notice of the allegations against him; he was allowed access to the evidence supporting these allegations; he was permitted to call his own witnesses, introduce evidence, and cross-examine opposing witnesses; and he was able to file motions and make legal arguments. This disciplinary action spanned one-and-a-half years and produced a record exceeding 10,000 pages. The DHC ruled on numerous motions filed by Defendant and issued orders containing extensive and detailed findings of fact and conclusions of law. Therefore, the record belies Defendant's assertion that he was denied due process in connection with his disciplinary proceeding.

C. Freedom of Speech

Defendant next makes the broad assertion that the Rules of Professional Conduct are unconstitutional — either facially or as applied to him — to the extent that they allowed him to be punished for speech that is protected by the First Amendment to the United States Constitution.[15] However, Defendant fails to make any particularized

15. We note that while this case was pending before the DHC, Defendant asserted several First Amendment claims arising from this disciplinary proceeding in a lawsuit against

arguments as to which rules he specifically believes are either facially unconstitutional or have been unconstitutionally applied to him. As such, he has waived his right to appellate review of this issue by failing to satisfy his burden as the appellant in this appeal to show a specific deprivation of his legal rights. *See State v. Billups*, 301 N.C. 607, 616, 272 S.E.2d 842, 849 (1981) ("[T]he appellant must show error positive and tangible, that has affected his rights substantially and not merely theoretically, and that a different result would have likely ensued." (citation and quotation marks omitted)).

Nevertheless, we take this opportunity to reject Defendant's categorical assertion that the First Amendment provides attorneys with blanket immunity from facing disciplinary sanctions for violating the ethical rules applicable to lawyers in North Carolina simply because those violations involve some form of speech. As a general proposition, the First Amendment does not immunize an attorney from being disciplined for violating the Rules of Professional conduct simply because the attorney employs "speech" in committing the violations. As with all constitutional rights, the right to free speech is not absolute.

As our Supreme Court has stated,

> [f]reedom of speech is not an unlimited, unqualified right. Speech may be subordinated to other values and considerations, and may be reasonably restrained as to time and place. It is well settled that, within proper limits, the right of free speech is subject to legislative restriction when such restriction is in the public interest. . . . The constitutional right of freedom of speech does not extend . . . to every use and abuse of the spoken and written word.

State v. Leigh, 278 N.C. 243, 250, 179 S.E.2d 708, 712 (1971) (internal citation omitted).

Indeed, the United States Supreme Court has recognized that certain restrictions on speech apply uniquely to attorneys.

> It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to "free speech" an attorney has is extremely circumscribed. An attorney may not, by speech or other conduct, resist a ruling of the trial court beyond the point necessary to preserve a claim for

---

the State Bar filed in Wake County Superior Court. That complaint was dismissed, and Defendant did not appeal the decision.

> appeal. *Even outside the courtroom, a majority of the Court in two separate opinions [has] observed that lawyers in pending cases were subject to ethical restrictions on speech to which an ordinary citizen would not be.*

Gentile v. State Bar of Nev., 501 U.S. 1030, 1071, 115 L. Ed. 2d 888, 921 (1991); *see, e.g.*, *id.* at 1073, 115 L. Ed. 2d at 922 (noting that in cases relating to regulation of advertising the Supreme Court has "not suggested that lawyers are protected by the First Amendment to the same extent as those engaged in other businesses"); *Sheppard v. Maxwell*, 384 U.S. 333, 363, 16 L. Ed. 2d 600, 620 (1966) (explaining that "[c]ollaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures").

In balancing the First Amendment rights of attorneys against the ability of states to discipline attorneys for unethical conduct, courts are to "engage[ ] in a balancing process, weighing the State's interest in the regulation of a specialized profession against a lawyer's First Amendment interest in the kind of speech that was at issue." *Gentile*, 501 U.S. at 1073, 115 L. Ed. 2d at 922. The Supreme Court has explained that "[s]tates have a compelling interest in the practice of professions within their boundaries, and as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions." *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 625, 132 L. Ed. 2d 541, 550 (1995) (citation, quotation marks, and ellipses omitted).

Moreover, "[t]he interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.' " *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792, 44 L. Ed. 2d 572, 588 (1975) (citation omitted). As such, the Supreme Court has recognized the substantial interest possessed by states both in "protect[ing] the integrity and fairness of a State's judicial system," *Gentile*, 501 U.S. at 1075, 115 L. Ed. 2d at 923, and in "protect[ing] the flagging reputations of . . . lawyers by preventing them from engaging in conduct that . . . is universally regarded as deplorable and beneath common decency . . . [,]" *Went For It*, 515 U.S. at 625, 132 L. Ed. 2d at 550 (quotation marks omitted).

We recognize that the precise contours of the restrictions that the First Amendment imposes on the power of states to regulate attorney speech are not always clear. However, judicial resolution of such

questions may only occur in cases where, unlike here, the issues have been properly presented to the court.

D. Assistance of Co-counsel

Defendant next contends that the DHC violated his right to counsel by granting the State Bar's motion that he be required to choose between either representing himself or being represented by counsel. At the beginning of his disciplinary proceeding, Defendant attempted to simultaneously represent himself *and* employ the assistance of co-counsel. The DHC ruled that Defendant would have to choose between proceeding *pro se* or, alternatively, being represented by counsel.

According to N.C. Gen. Stat. § 1-11, "[a] party may appear either in person or by attorney in actions or proceedings in which he is interested." N.C. Gen. Stat. § 1-11 (2015). Our Supreme Court has construed this provision to mean that a litigant "has no right to 'appear' both by himself and by counsel." *Hamlin v. Hamlin*, 302 N.C. 478, 482, 276 S.E.2d 381, 384-85 (1981). While Defendant argues that this general rule should be modified when the party is an attorney, he cites no legal authority for this position, and we have been unable to locate any caselaw that would support his argument. Accordingly, we conclude that the DHC's ruling on this issue was proper.

E. Amendment to Complaint

Defendant also contends that the DHC improperly allowed the State Bar to file a second amended complaint containing additional allegations that were not sufficiently related to the allegations in the original complaint. The motion seeking leave to file the second amended complaint was filed on 4 November 2013, and it was granted on 3 December 2013 without any response from Defendant having been filed. The DHC heard evidence relating to the new allegations during the hearings for the adjudicatory phase, which concluded on 11 June 2014. Defendant did not raise any challenge to this amendment until 6 August 2014 — approximately eight months after the motion to amend was granted and almost two months after the DHC concluded its evidentiary hearings on all of the allegations, including those contained in the second amended complaint.

Unless an issue is automatically preserved by law, "[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a *timely* request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1) (emphasis added). Defendant has presented no legal authority

supporting the proposition that this issue was automatically preserved or was preserved by his untimely objection filed months after the motion to amend was filed and granted. Accordingly, we hold that due to his failure to raise a timely objection to the filing of the second amended complaint, Defendant has waived his right to appellate review of this issue. *See N.C. State Bar v. Beaman*, 100 N.C. App. 677, 684, 398 S.E.2d 68, 72 (1990) (because "no objection to the State Bar's motion to amend its complaint to include [the defendant]'s alleged violation of Rule 1.2(D) was made and . . . his alleged violation of this rule was argued before the Committee . . . [,] the issue will be treated as being properly pled").

F. Signatures on Complaints

Defendant next argues that the DHC lacked subject matter jurisdiction because the chairperson of the State Bar's Grievance Committee did not physically sign the original complaint or the second amended complaint. According to the State Bar Discipline and Disability Rules, once the Grievance Committee has determined that probable cause exists to believe that a violation of the Rules of Professional Conduct has occurred, a formal complaint is filed. 27 N.C. Admin Code 1B.0113(a). "Formal complaints will be issued in the name of the North Carolina State Bar as plaintiff and signed by the chairperson of the Grievance Committee. Amendments to complaints may be signed by the counsel alone, with the approval of the chairperson of the Grievance Committee." 27 N.C. Admin Code 1B.0113(n).

Here, the original complaint contained a digital image of the signature of the then-chairperson of the Grievance Committee, Margaret M. Hunt. That complaint, as well as the second amended complaint, also bore the signatures of counsel for the State Bar.[16] Defendant has cited to no legal authority providing that it was impermissible for the Grievance Committee chairperson to use an electronic reproduction of her signature on the initial complaint.

Indeed, our Supreme Court has explained that "public documents may be authenticated by mechanical reproduction of the signature of the authorized officer when he intends to adopt the mechanical reproduction as his signature." *State v. Watts*, 289 N.C. 445, 449, 222 S.E.2d 389, 392 (1976); *see id.* at 448, 222 S.E.2d at 391 ("[I]n legal contemplation

16. After Defendant challenged the lack of an original signature on the initial complaint, the DHC allowed the State Bar to retroactively file versions of the complaints containing Hunt's original ink signature.

'to sign' means to attach a name or cause it to be attached by any of the known methods of impressing the name on paper with the intention of signing it."). Accordingly, we reject Defendant's argument that subject matter jurisdiction was lacking simply because Hunt signed the original complaint by means of an electronic signature.[17]

G. Notice of Factors to be Considered at Dispositional Phase

Defendant also argues that he was not provided advance "notice of the aggravating factors that the [State] Bar intended to use against him" during the dispositional phase of the proceeding. Pursuant to the Discipline and Disability Rules, "[i]f the charges of misconduct are established, the hearing panel will then consider any evidence relevant to the discipline to be imposed." 27 N.C. Admin. Code 1B.0114(w). These rules, in turn, list factors that the DHC is to consider in all cases, *see* 27 N.C. Admin. Code 1B.0114(w)(3), as well as additional factors to be considered in cases where the DHC imposes a sanction of disbarment or suspension, *see* 27 N.C. Admin. Code 1B.0114(w)(1).

Defendant provides no authority — nor have we found any — in support of his contention that the State Bar was required to notify him in advance of which *particular* factors in 27 N.C. Admin. Code 1B.0114(w) it planned to argue were relevant at the dispositional phase. Moreover, the statute itself gave Defendant notice of the list of factors that the State Bar could rely upon. We note that Defendant does not dispute that he received in discovery notice of all the facts the State Bar sought to establish in both the adjudicatory and dispositional phases of the proceedings. Accordingly, we do not find merit in Defendant's argument on this issue.

H. Adequacy of Findings and Conclusions at Dispositional Phase

In addition, Defendant contends that the DHC never provided him with adequate reasons for the sanction it imposed against him and that the DHC acted improperly in largely adopting the proposed findings and conclusions submitted by the State Bar.

In imposing a disciplinary sanction, the DHC must support its "choice with written findings that . . . are consistent with the statutory scheme of N.C.G.S. § 84-28[.]" *Talford*, 356 N.C. at 638, 576 S.E.2d at 313. N.C. Gen. Stat. § 84-28 provides five levels of punishment for attorney

17. We note that pursuant to 27 N.C. Admin Code 1B.0113(n), the Grievance Committee chairperson was only required to approve, rather than sign, the amended complaints.

misconduct: disbarment, suspension, censure, reprimand, and admonition. N.C. Gen. Stat. § 84-28(c). Our Supreme Court has explained that the statutory scheme set out in N.C. Gen. Stat. § 84-28 "clearly evidences an intent to punish attorneys in an escalating fashion keyed to: (1) the harm or potential harm created by the attorney's misconduct, and (2) a demonstrable need to protect the public." *Talford*, 356 N.C. at 637-38, 576 S.E.2d at 313 (emphasis omitted). Furthermore,

> in order to merit the imposition of suspension or disbarment, there must be a clear showing of how the attorney's actions resulted in significant harm or potential significant harm to [a client, the administration of justice, the profession, or members of the public], and there must be a clear showing of why suspension and disbarment are the only sanction options that can adequately serve to protect the public from future transgressions by the attorney in question. . . . Thus, upon imposing a given sanction against an offending attorney, the DHC must provide support for its decision by including adequate and specific findings that address these two key statutory considerations.

Id. at 638, 576 S.E.2d at 313 (quotation marks and emphasis omitted).

Here, the dispositional portion of the Order of Discipline included (1) extensive factual findings as to Defendant's actions that clearly caused significant — or potentially significant — harm to clients, the administration of justice, the profession, and members of the public;[18] (2) conclusions of law regarding the specific factors set forth in 27 N.C. Admin. Code 1B.0114(w) relevant to this case; and (3) an explanation as to why a five-year suspension was the least severe sanction necessary to protect the public from future transgressions by Defendant.

---

18. The DHC dedicated 13 single-spaced pages of the dispositional portion of its Order of Discipline to describe numerous incidents involving actual or potential harm caused by Defendant's actions. Defendant does not make any specific challenges to these findings. Rather, he asserts that (1) the DHC did not tie the incidents described in those findings to specific violations of the Rules of Professional Conduct; and (2) some of those incidents occurred outside of the six-year statute of limitations that generally applies to the filing of attorney misconduct grievances, *see* 27 N.C. Admin. Code 1B.0111(f)(4). However, Defendant fails to point to any authority mandating that facts relevant at the *dispositional* phase — as opposed to facts underlying a particular *adjudication* of misconduct — must be specifically tied to a particular disciplinary rule or have occurred within six years of the filing of a grievance. In fact, "[i]f the charges of misconduct are established, the hearing panel will then consider *any* evidence relevant to the discipline to be imposed." 27 N.C. Admin. Code 1B.0114(w) (emphasis added).

On this last point, the DHC stated the following in its Order of Discipline:

> 7. Defendant's persistent pattern of misconduct up through and including his actions in this disciplinary proceeding indicate that Defendant is either unwilling or unable to conform his behavior to the requirements of the Rules of Professional Conduct. Defendant refuses to acknowledge the wrongfulness of his conduct and stated that he does not intend to modify his behavior. Accordingly, if Defendant were permitted to continue practicing law, he would pose a significant risk of continued harm to clients, the profession, the public, and the administration of justice.
>
> 8. The Hearing Panel finds that admonition, reprimand, or censure would not be sufficient discipline because of the gravity of the harm to the administration of justice and to the legal profession in the present case. Furthermore, the Panel finds that any sanction less than suspension would fail to acknowledge the seriousness of the offenses committed by Defendant, would not adequately protect the public, and would send the wrong message to attorneys and the public regarding the conduct expected of members of the Bar in this State.
>
> 9. Notwithstanding repeated prior warnings about the impropriety of his conduct and an attempt to reform his behavior through mentoring, Defendant exhibits escalating misconduct and a wholly unrepentant attitude. Accordingly, the protection of the public requires that Defendant be required to demonstrate rehabilitation and reformation before he may be permitted to resume practicing law.
>
> 10. The Hearing Panel finds and concludes that the public can only be adequately protected by an active suspension of Defendant's law license, with reinstatement to the practice of law conditioned upon a showing of reformation and other reasonable conditions precedent to reinstatement.

Defendant also asserts that the Order of Discipline is deficient because many of its findings were taken verbatim from the proposed order of discipline submitted by the State Bar. Defendant asserts that

such action amounts to an abdication of the DHC's authority. We are not persuaded.

It is the accepted practice in North Carolina for the prevailing party to draft and submit a proposed order that the decision-making body may then issue as its own — with or without amendments. *See*, *e.g.*, *In re J.B.*, 172 N.C. App. 1, 25, 616 S.E.2d 264, 279 (2005) ("Nothing in the statute or common practice precludes the trial court from directing the prevailing party to draft an order on its behalf."); *Farris v. Burke Cty. Bd. of Educ.*, 355 N.C. 225, 242, 559 S.E.2d 774, 784 (2002) (upholding propriety of school superintendent's counsel preparing findings of fact to be adopted by board of education and noting that "[s]imilar procedures are routine in civil cases, where a judge is permitted to ask the prevailing party to draft a judgment"); *Johnson v. Johnson*, 67 N.C. App. 250, 257, 313 S.E.2d 162, 166 (1984) ("The trial judge properly directed the attorney for the [prevailing party] to prepare proposed findings and conclusions and draft the judgment, and adopted the judgment as his own when tendered and signed.").

Here, Defendant has not directed our attention to any applicable statute or regulation prohibiting the DHC from adopting the proposed findings and conclusions submitted by the State Bar. Accordingly, he has failed to show error. Moreover, we conclude that the DHC fully complied with the requirements of N.C. Gen. Stat. § 84-28 in imposing its sanction in this case.

I. Assessment of Fees and Costs

Defendant next asserts that the DHC erred in assessing fees and costs against him in the amount of $35,315.95. However, because Defendant neither cites to any legal authority in support of this argument nor explains why he believes the amount of fees and costs assessed was unreasonable, we deem this issue waived pursuant to Rule 28(b)(6) of the North Carolina Rules of Appellate Procedure. *See Ethridge*, 188 N.C. App. at 668, 657 S.E.2d at 387 (holding that because "defendant fail[ed] to cite any authority" for certain assignments of error, those "assignments of error are deemed abandoned pursuant to N.C.R. App. P. 28(b)(6)").[19]

19. Moreover, we note that N.C. Gen. Stat. § 84-34.2 expressly permits the State Bar to impose certain types of fees, including an "administrative fee for any attorney against whom discipline has been imposed." N.C. Gen. Stat. § 84-34.2 (2015). In its brief, the State Bar has represented to this Court that "[i]n April 2010, the [State Bar] Council adopted a schedule of administrative fees for the disciplinary program that included a fee of $1,500.00 per day for each day spent in a contested DHC hearing that resulted in the imposition of discipline."

III. Challenges to Factual Findings and Conclusions of Law

[2] Having rejected all of Defendant's constitutional and procedural arguments, we next turn our attention to Defendant's specific challenges to the DHC's findings of fact and conclusions of law as to each of the seven matters summarized earlier in this opinion that formed the basis for his disciplinary proceeding. We address in turn each of Defendant's arguments regarding these seven matters.

A. The Pollard Matter

Defendant contends that the DHC's findings of fact do not support its conclusion of law that his behavior during the deposition of Pollard constituted "conduct intended to disrupt a tribunal" in violation of Rule 3.5(a)(4) because the deposition did not constitute a "tribunal." Defendant asserts that depositions were only included within the meaning of the term "tribunal" by virtue of a 2015 amendment to the Rules of Professional Conduct such that a deposition could not properly have been considered a "tribunal" at the time of Pollard's 2011 deposition.

However, at the time of Pollard's deposition, the official commentary to the Rules of Professional Conduct stated, in pertinent part, that "[t]he duty to refrain from disruptive conduct applies to any proceeding of a tribunal, *including a deposition*." N.C. Rev. R. Prof. Conduct 3.5, cmt. 10 (2011) (emphasis added). "The Comment accompanying each Rule [of Professional Conduct] explains and illustrates the meaning and purpose of the Rule." N.C. Rev. R. Prof. Conduct 0.2[8]. As such, the official commentary does "not add obligations to the Rules but provide[s] guidance for practicing in compliance with the Rules." N.C. Rev. R. Prof. Conduct 0.2[1].

This Court has previously utilized the commentary to the Rules of Professional Conduct in construing their meaning. *See*, *e.g.*, *N.C. State Bar v. Merrell*, __ N.C. App. __, __, 777 S.E.2d 103, 114 (2015) (scope of Rule 1.7(a) regarding representation involving conflict of interest); *N.C. State Bar v. Simmons*, __ N.C. App. __, __, 757 S.E.2d 357, 363-64 (meaning of "criminal act" under Rule 8.4(b)), *disc. review denied*, 367 N.C. 791, 766 S.E.2d 848 (2014); *N.C. State Bar v. Key*, 189 N.C. App. 80, 91-92, 658 S.E.2d 493, 501 (2008) (scope of "conduct prejudicial to the administration of justice" under Rule 8.4). Therefore, we dismiss Defendant's argument that the DHC erred in treating a deposition as a "tribunal" for purposes of Rule 3.5.[20]

20. Our holding on this issue applies equally to Defendant's challenges to Conclusions Nos. 2(d)-(e) of the DHC's conclusions of law from the adjudicatory phase in which he makes the same argument with respect to his conduct during the Langston deposition.

Defendant also argues that the DHC did not make sufficient findings to support its conclusion that his comments during the Pollard deposition constituted "conduct prejudicial to the administration of justice in violation of Rule 8.4(d)." The Comment to Rule 8.4 states that

> [a] showing of actual prejudice to the administration of justice is not required to establish a violation of Paragraph (d). Rather, it must only be shown that the act had a *reasonable likelihood of prejudicing the administration of justice*. . . . The phrase "conduct prejudicial to the administration of justice" in paragraph (d) should be read broadly to proscribe a wide variety of conduct, including conduct that occurs outside the scope of judicial proceedings.

N.C. Rev. R. Prof. Conduct 8.4, cmt. 4 (emphasis added). We have previously adopted the standard set forth in this Comment in construing Rule 8.4. *See Key*, 189 N.C. App. at 91-92, 658 S.E.2d at 501 (applying "reasonable likelihood of prejudicing the administration of justice" standard contained in Comment to Rule 8.4).

Here, we are satisfied that the DHC's findings — which showed that Defendant repeatedly interjected his own questions and commentary, made sarcastic remarks, coached Pollard on how to respond to particular questions, and answered questions for Pollard — supported its conclusion that Defendant violated Rule 8.4(d) as it was reasonable to conclude that such disruptive and improper tactics "had a reasonable likelihood of prejudicing the administration of justice." N.C. Rev. R. Prof. Conduct 8.4, cmt. 4.

Defendant also contests several of the DHC's findings of fact relating to his statement in an affidavit that he did not sponsor the justice4stacey.com website. Defendant specifically challenges Finding No. 31, which states that "Defendant never specifically billed Barbara Pollard to be reimbursed for the website expenses." He argues that "Barbara Pollard and [Defendant] testified that she reimbursed all website expenses and no one testified otherwise." However, the fact that Pollard may at some point have reimbursed Defendant for the website costs does not undermine Finding No. 31, which simply states that he never specifically billed her for these expenses.

Defendant next challenges Finding No. 32, which states that

> [a]lthough Defendant has contended that he was reimbursed by his client for the cost of registering the website,

> he did not produce any documents in response to a request for production of all documents reflecting payments by him in connection with the justice4stacey website and his efforts to obtain reimbursement from Ms. Pollard. At this hearing, Defendant testified that he did not produce the documents because he did not have them.

Defendant asserts that he attempted to enter such documentation into evidence during the hearing but the DHC denied his request. Our review of the hearing transcript reveals that based upon the State Bar's objection, the DHC denied Defendant's attempt to enter the receipts into evidence because he had failed to provide them in discovery despite the State Bar's unambiguous request for him to do so. Defendant has not presented any argument that this evidentiary ruling was erroneous. Accordingly, we find no merit to Defendant's challenge to Finding No. 32.

Defendant also challenges Conclusion No. 2(c), which states as follows:

> By swearing in an affidavit submitted to the court that he did not sponsor the website and that another person was responsible for the expenses of the website when in fact he was the initial registrant and administrator of the website and paid for the registration, Defendant engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.4(c), and engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d)[.]

Defendant contends that "[t]here is no supportive finding that [Defendant] was the 'sponsor' of the website . . . ." However, the DHC made the following findings regarding the website:

> 24. Defendant was involved in discussions and meetings about setting up the website.
>
> . . . .
>
> 26. Defendant was the initial registrant and administrator of the website which was registered on July 11, 2007.
>
> 27. Defendant paid the domain registrar for the website to be registered.
>
> 28. Defendant was identified as the contact person on the website and his name, address, telephone number, and email address were listed. As a result, Defendant

received numerous phone calls and correspondence from visitors to the website.

29. A passcode was required to post material to the website. Defendant had the passcode and posted some documents on the website.

30. Defendant was involved in the decision to take the website down.

31. Defendant never specifically billed Barbara Pollard to be reimbursed for the website expenses.

These findings describe Defendant's role in planning, registering, paying to set up, controlling access to, and providing content for the website. Therefore, we conclude the DHC's determination that Defendant was the sponsor of the justice4stacey.com website is sufficiently supported by the DHC's findings of fact.

Defendant also argues that the DHC erred in Conclusion No. 2(c) in determining that his misstatement regarding his sponsorship of the website was "conduct prejudicial to the administration of justice[.]" However, we believe that the DHC's findings did, in fact, demonstrate that Defendant's actions "had a reasonable likelihood of prejudicing the administration of justice" as they showed that Defendant made a false representation about a matter material to Fagan's motion to change venue that was pending before the court.

B. The Langston Matter

Defendant challenges the DHC's conclusion that "[b]y abruptly leaving Ms. Langston's deposition with the deponent prior to the completion of opposing counsel's questioning without filing a motion to terminate the deposition, Defendant knowingly disobeyed an obligation under the rules of the tribunal in violation of Rule 3.4(c)[.]" He argues that this conclusion is unsupported because the DHC never specifically named the rule that Defendant disobeyed. However, it is clear that the DHC's conclusion was a reference to Rule 30(d) of the North Carolina Rules of Civil Procedure,[21] which is titled "Motion to terminate or limit examination" and explains that a *judge* — as opposed to counsel for a party

21. N.C. R. Civ. P. 30(d) provides as follows:

(d) Motion to terminate or limit examination. — At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith

— may "cease" or "limit" a deposition "on motion of a party . . . ." The fact that the DHC was referring to Rule 30(d) is apparent because the DHC specifically discussed Defendant ending the deposition without "filing a motion to terminate the deposition[.]" Accordingly, this argument is without merit.

Defendant also challenges the following findings of fact with respect to one of his misstatements during the Langston Matter:

> 55. On May 2, 2012, in a hearing on the plaintiff's motion to prevent waste of marital and separate property pending equitable distribution, Defendant represented to the presiding judge that R & L Investment Homes, LLC had been dissolved by the North Carolina Secretary of State because Mr. Langston[, the ex-husband of Defendant's client,] had forged documents, stating, "Yes, your Honor, and the Secretary of State just annulled the entity because he forged three of 'em that say something different."
>
> 56. At the time Defendant made this statement to the court, Defendant knew the North Carolina Secretary of State had issued a Certificate of Administrative Dissolution of R & L Investment Homes, LLC for failure to file an annual report.

Defendant asserts that these findings "do not say that [he] knew the statement at issue was false as required by RPC 8.4 and it [sic] omits undisputed testimony from [him] and Ms. Lee that they both believed the statement to be true." However, the record shows that Defendant himself admitted that he knew the corporation had been administratively dissolved rather than having been dissolved due to fraud. Defendant further acknowledged that at the time he made the statement that the corporation had been "annulled" because of fraud, he "knew there was

---

> or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, a judge of the court in which the action is pending or any judge in the county where the deposition is being taken may order before whom the examination is being taken to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). If the order made terminates the examination, it shall be resumed thereafter only upon the order of a judge of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

a letter stating that it was administratively dissolved." Accordingly, Findings Nos. 55 and 56 are adequately supported by the evidence.

For similar reasons, we reject Defendant's challenge to Conclusion No. 2(g), which states, in pertinent part, that

> [b]y falsely representing to the court that the Secretary of State had dissolved the LLC because of forgery, Defendant engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.4(c), and engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d)[.]

Defendant argues that the DHC did not make a specific finding that he *knowingly* made the false statement. However, as explained above, both the DHC's findings and the supporting evidence show that Defendant was indeed aware of the falsity of his statement.

Defendant also contends that the DHC's findings do not support its conclusion that Defendant's misstatement had a prejudicial impact on the administration of justice. This assertion is meritless as the DHC could reasonably have determined that the misrepresentation "had a reasonable likelihood of prejudicing the administration of justice" in that it would have caused the trial court to labor under the false notion that a party in the case had committed forgery.

Defendant next challenges Finding No. 62, which states that

> Defendant's statement accusing Mr. Miller[, Defendant's opposing counsel in the Langston Matter,] of slipping the handwritten provision into the mediated settlement agreement after Defendant had signed it and without Defendant's knowledge or approval was false and Defendant knew at the time he made the statement that it was false.

In his brief, Defendant states that "Finding #62 that [Defendant] *knew* . . . the statement was false is not supported by the record. [W]here the Bar's own witness contradicted the allegation and 2 witnesses said [Defendant] did not make the statement." (Internal citations omitted.)

We are satisfied that the record contains sufficient evidence from which the DHC could have found that Defendant did, in fact, knowingly make a false statement regarding Miller "slipping" a provision into the settlement agreement without Defendant's knowledge. Miller testified before the DHC that "[Defendant] accused me of slipping [the provision]

in before he signed the document and without his knowledge. And that statement was made to Judge Paul."

Judge Paul confirmed in his testimony before the DHC that Defendant made such an accusation in his presence. In addition, the mediator who oversaw the settlement negotiations testified that he had "a specific recollection of pointing out [the added provision] to [Defendant]" and then asking Defendant and his client if "either of you have any problem" with the additional provision at which point the mediator "showed them the provision" and "[t]hey both said they had no problem with it." This testimony is reflected in the DHC's Finding No. 61, which states that "[p]rior to Defendant signing the mediated settlement agreement, the mediator had pointed out the handwritten provision to Defendant and Defendant agreed to the provision."

We note that Defendant correctly points out that Finding No. 62 incorrectly states that Defendant accused Miller of slipping in the provision *after* Defendant signed the settlement agreement rather than *before* he signed it. However, we find this discrepancy immaterial to the overall finding — which, as shown above, is supported by the evidence — that Defendant falsely accused Miller of adding a provision to the settlement agreement without Defendant's knowledge or approval. That finding, in turn, supports the DHC's conclusion of law that Defendant "knowingly made a false statement of material fact to a tribunal in violation of Rule 3.3(a)(1), engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of Rule 8.4(c), and engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d)."

Therefore, even though Finding No. 62 — as written — is partially unsupported by the evidence of record, the remaining portion of Finding No. 62, in conjunction with Finding No. 61, adequately supports the DHC's legal conclusion. *See*, *e.g.*, *Meadows v. Meadows*, __ N.C. App. __, __, 782 S.E.2d 561, 566 (2016) ("[E]ven assuming, *arguendo*, that both findings are not supported by competent evidence, it is of no consequence to the instant case. The remaining binding findings of fact, cited above, are sufficient to support the trial court's judgment . . . ."); *Estate of Gainey v. S. Flooring & Acoustical Co.*, 184 N.C. App. 497, 503, 646 S.E.2d 604, 608 (2007) ("[W]here there are sufficient findings of fact based on competent evidence to support the tribunal's conclusions of law, the decision will not be disturbed because of other erroneous findings which do not affect the conclusions." (citation, quotation marks, and brackets omitted)). Accordingly, we find Defendant's argument on this issue to be without merit.

C. The Gorham Matter

Defendant next challenges the following conclusion of law with regard to Defendant's conduct toward Judge Gorham:

> By being disrespectful to the judge during a jury trial after having been warned by the Court about his conduct, Defendant knowingly disobeyed an obligation under the rules of the tribunal in violation of Rule 3.4(c), engaged in conduct prejudicial to the administration of justice in violation of Rule 8.4(d), and engaged in conduct intended to disrupt a tribunal by engaging in undignified or discourteous conduct that is degrading to a tribunal in violation of Rule 3.5(a)(4)(B)[.]

Defendant contends that there is no finding or evidence indicating that he "knowingly disobeyed an obligation under the rules of the tribunal" or engaged in conduct "degrading to a tribunal." Rather, he asserts that the record shows that nothing happened "more than the morning recess in a murder trial."

The DHC made the following findings with regard to this incident:

> 64. During the course of the trial Defendant spoke disrespectfully to the judge at a bench conference and Judge Gorham admonished Defendant about engaging in disrespectful behavior toward the court.
>
> 65. Subsequently, at another bench conference on August 1, 2012, while the jury was present in the courtroom, Defendant grimaced at Judge Gorham and in an angry tone of voice accused Judge Gorham of allowing the prosecutor to get inadmissible evidence to the jury.
>
> 66. Defendant's conduct prompted Judge Gorham to declare a recess in the trial and give the jury a break so that she could address Defendant's conduct.
>
> 67. During the in-chambers discussion about Defendant's conduct, Defendant stated: a) "And I do think if I was angry, I am sorry that I was angry and I expressed it. I'm not going to deny that I was." and b) "you said that I appeared disrespectful and I had a grimace and I am trying to explain that I was upset and the reasons that have gone into my [being] upset."

> 68. Rule 12 of the North Carolina General Rules of Practice for the Superior and District Courts provides: "Counsel are at all times to conduct themselves with dignity and propriety … Counsel should yield gracefully to rulings of the court and avoid detrimental remarks both in court and out. He should at all times promote respect for the court."

These findings — which are supported in the record by the testimony of Assistant District Attorney Mike Muskus, who was the prosecutor present during these events — clearly support the DHC's conclusions. To the extent Defendant argues there is no evidence that he *knew* he was violating a rule or causing a disruption, it is axiomatic that one's state of mind is rarely shown by direct evidence and must often be inferred from the circumstances. *See Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 260, 266 S.E.2d 610, 619 (1980) ("A litigant's state of mind is seldom provable by direct evidence but must ordinarily be proven by circumstances from which it may be inferred."). Here, it was eminently reasonable for the DHC to conclude that Defendant understood he was not conducting himself "with dignity and propriety," "yield[ing] gracefully to rulings of the court," "avoid[ing] detrimental remarks both in court and out[,]" and "promot[ing] respect for the court."

D. The Davenport Matter

With respect to his representation of Davenport, Defendant first challenges the DHC's finding that he "sent a demand letter" to Roughton and the Sheriff of Pasquotank County. However, Defendant admitted in his answer filed with the DHC that he sent the demand letter. Accordingly, he may not challenge on appeal the DHC's finding as to that fact. *See Baker v. Mauldin*, 82 N.C. App. 404, 406, 346 S.E.2d 240, 241 (1986) (holding that a defendant is bound by admissions in his answer).

Defendant also challenges Finding No. 84, which states, in relevant part, that Defendant "was aware that [Norman] Shearin represented Roughton in the dispute with Davenport . . . ." However, among other evidence establishing that Defendant knew Roughton was represented by counsel, the record shows that (1) Roughton's attorney, Shearin, testified that he had conversations with Phillip Hayes, Defendant's co-counsel, regarding the dispute between Roughton and Davenport; and (2) within a month prior to sending the demand letter, Defendant contacted Shearin's office about taking Roughton's deposition. Accordingly, this evidence supports the DHC's finding that Defendant did indeed know Roughton was represented by counsel at the time he sent the demand letter.

Defendant next challenges the DHC's Conclusion No. 2(j), which states that

> [b]y impugning the integrity of the investigating officer in Davenport's pending criminal cases and accusing the Sheriff's Department of a criminal act in a video posted online, Defendant used means in representing a client that had no substantial purpose other than to embarrass or burden a third person in violation of Rule 4.4(a)[.]

Specifically, Defendant contends that "[t]here is no finding or fact in the record which shows that [he] accused [Investigator] Keith of being dishonest or lacking in integrity nor even that Keith was 'the investigating officer.' "

However, the Pasquotank County Attorney, Mike Cox, testified that Investigator Keith was indeed the officer investigating Davenport. Moreover, both the DHC's findings of fact and the video evidence of the encounter, which is in the record, establish that when Investigator Keith refused to release certain property to Defendant, Defendant referenced North Carolina's embezzlement statute and stated that it was a "class C felony by the sheriff" for him not to return to the proper owner property obtained under color of law.

Given the contents of the video and Defendant's admission that he put the video on the Internet to be "a smart aleck" rather than to further his representation of Davenport, we are satisfied that there is support in the record for the DHC's conclusion that Defendant "used means in representing a client that had no substantial purpose other than to embarrass or burden a third person in violation of Rule 4.4(a)."

E. The Shackley Matter

Defendant challenges Findings Nos. 95 and 97 in connection with the Shackley Matter, which state as follows:

> 95. Thereafter during the phone conversation, Defendant made a number of assertions about Hughes, including that Hughes had "hit on" Shackley's wife, who "had big boobs" and ran a prostitution website.
>
> . . . .
>
> 97. Immediately after the phone conversation, Hughes's acquaintance called Hughes and reported — among other things — that Defendant had referenced

> Hughes'[s] preference for bigbreasted women, and his interest in a "prostitute."

While Defendant contends that these findings are "misleading to a fraudulent degree," he fails to explain how this is so. Moreover, these findings are largely supported both by Sugg's testimony and the handwritten notes she made on the evening of the call.

F. The Dolenti Matter

Defendant argues that the characterization in Finding No. 103 of the tone of the voicemail he left for Dolenti as "threatening, insulting, and intimidating" is unsupported because Detective Dolenti never testified at the disciplinary proceeding. However, based on our consideration of the voicemail — which is contained in the record on appeal as an audio recording — we believe that the evidence fully supported the DHC's finding that Defendant's tone was "threatening, insulting, and intimidating."

G. The Deans Matter

We also find no merit in Defendant's challenge to Finding No. 110, which states that "Defendant's comments to Mrs. Deans about her father and stepmother and the Pitt County District Attorney were malicious and vindictive." Defendant's sole ground for challenging this finding is that neither the complaint nor the Order of Discipline included the actual words used in the voicemail. However, the voicemail was entered into evidence during the proceeding and is part of the record on appeal. The recording supports the DHC's determination that the comments made about Deans' father and stepmother and the district attorney were "malicious and vindictive." Nor are we persuaded by Defendant's argument that the DHC was required to quote verbatim the inappropriate comments he made.

Conclusion

For the reasons stated above, we affirm the DHC's 13 November 2014 Order of Discipline.

AFFIRMED.

Chief Judge McGEE and Judge STEPHENS concur.

CHRISTOPHER SCOGGIN, PLAINTIFF
v.
FELICITAS B. SCOGGIN (NOW HAYES), DEFENDANT

No. COA16-311

Filed 18 October 2016

1. Child Custody and Support—custody modification—written judgment different from oral pronouncement

The court did not err in a child custody modification case by entering an order that reached a conclusion that differed from its oral pronouncement. Entry of judgment based upon oral rendition of judgments is no longer allowed in civil matters. Judgments and orders are only entered when they are reduced to writing, signed by the judge, and filed with the clerk of court.

2. Child Custody and Support—custody modification—primary physical custody—best interest of child

The trial court did not err in a child custody modification case by awarding primary physical custody of the children to plaintiff father. Defendant mother failed to make a persuasive argument that it was not in the best interest of the children.

Appeal by defendant from order entered 8 September 2015 by Judge William B. Sutton, Jr. in Onslow County District Court. Heard in the Court of Appeals 21 September 2016.

The Armstrong Law Firm, P.A., by Eason Armstrong Keeney and L. Lamar Armstrong, Jr., for plaintiff-appellee.

The Lea/Schultz Law Firm, P.C., by James W. Lea, III, for defendant-appellant.

ZACHARY, Judge.

Felicitas Hayes, formerly Felicitas Scoggin, (defendant), appeals from an order that awarded Christopher Scoggin (plaintiff) primary custody of the parties' four children. On appeal, defendant argues that the trial court erred by entering a child custody order that conflicted with oral statements that the court made during the custody hearing, and that the trial court erred by finding that it was in the best interest of the children for plaintiff to have their primary physical custody. We conclude

that the trial court had the authority to enter an order that was different from the court's oral statements during the hearing, and that the trial court did not err by awarding primary physical custody of the children to plaintiff.

I. Factual and Procedural Background

The parties were married on 12 May 2003, separated on 6 March 2013, divorced on 17 September 2013, and are the parents of four children, born in 2002, 2003, 2009, and 2010. At the time of their divorce, plaintiff and defendant were living in California and were both serving in the United States Marine Corps. On 10 May 2013, the parties executed a settlement agreement providing that plaintiff and defendant would share joint legal and physical custody of the children, with the children alternating residence with each parent every other week. In June 2013, plaintiff received military orders to report to Jacksonville, North Carolina, and on 21 June 2013, the parties modified their agreement in order to allow plaintiff to take the children with him to North Carolina. During the following year, the children spent periods of time with plaintiff, defendant, and with plaintiff's parents.

On 22 May 2014, plaintiff filed a motion for modification of child custody. Plaintiff alleged that there had been a substantial change of circumstances in that plaintiff and defendant had moved to North Carolina and Indiana, respectively, and therefore could no longer adhere to the existing custody arrangement pursuant to the terms of which the children spent alternate weeks with each parent. Plaintiff also alleged that defendant had failed to comply with the parties' agreement regarding child custody, and sought primary physical custody of the children. On 10 July 2014, defendant filed a response and countermotion for primary physical custody of the children, in which defendant alleged that plaintiff had failed to abide by the requirements of the parties' custody agreement.

On 10 June 2015, the trial court conducted a hearing on the parties' motions for custody of the children. The trial court heard conflicting testimony from each party regarding the other party's lack of cooperation with their custody agreement. At the close of the hearing, the trial judge spoke for several minutes about the considerations that the court deemed important to the custody determination, and stated that either party would be a fit and proper person to have custody of the children. After reviewing in detail the facts that tended to support each party's claim for primary physical custody of the children, the trial court stated that the parties would share joint legal custody of the children, with defendant having primary physical custody and plaintiff having

visitation rights. The court ended the hearing by stating that "[t]his is a really hard decision" and that "I just hope and pray that I've done the right thing." The trial court did not ask counsel for either party to draft an order reflecting the court's decision.

On 8 September 2015, the trial court entered an order for child custody. The court awarded primary physical custody of the children to plaintiff, with defendant to have "liberal visitation privileges," and made findings that supported the court's decision. The trial court's findings also addressed the fact that its decision was different from what the court had orally stated during the hearing:

> 15. That the Court immediately following the closing arguments of counsel stated that this was a very close call in deciding custody and then rendered an oral pronouncement awarding the defendant primary custody with secondary custody being granted to the plaintiff.
>
> 16. That the Court, following the trial after further deliberation and consideration, decided based on the facts contained in this order that it was in the best interests of the minor children to change and reverse the Custody pronouncement previously stated in Court and instead to direct custody as shown in this written order.
>
> 17. That the Court notified counsel for both parties that it wanted to meet with them on the Monday following the trial and met with both counsel in Chambers, telephonically or in person on the following Wednesday, at which time the new and amended Order was pronounced by the Court.
>
> 18. That no Order had been signed or rendered prior to the final pronouncement by the Court to the parties' counsel in Chambers and this Order is the only written signed Order rendered in this case.

Defendant appealed to this Court from the trial court's order for child custody.

II. Standard of Review

The standard of review in child custody cases may be summarized as follows:

> The standard of review "when the trial court sits without a jury is whether there was competent evidence to support

> the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." "In a child custody case, the trial court's findings of fact are conclusive on appeal if supported by substantial evidence, even if there is sufficient evidence to support contrary findings. . . . Unchallenged findings of fact are binding on appeal." "Whether [the trial court's] findings of fact support [its] conclusions of law is reviewable *de novo*." "If the trial court's uncontested findings of fact support its conclusions of law, we must affirm the trial court's order."

Burger v. Smith, __ N.C. App. __, __, 776 S.E.2d 886, 888-89 (2015) (quoting *Barker v. Barker*, 228 N.C. App. 362, 364, 745 S.E.2d 910, 912 (2013), *Peters v. Pennington*, 210 N.C. App. 1, 12-13, 707 S.E.2d 724, 733 (2011), *Hall v. Hall*, 188 N.C. App. 527, 530, 655 S.E.2d 901, 904 (2008), and *Respess v. Respess*, 232 N.C. App. 611, 614, 754 S.E.2d 691, 695 (2014) (internal quotation omitted)).

In addition, "[i]t is a long-standing rule that the trial court is vested with broad discretion in cases involving child custody." *Pulliam v. Smith*, 348 N.C. 616, 624, 501 S.E.2d 898, 902 (1998) (citation omitted). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason[.]" *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) (citation omitted). The rationale for this rule has been explained as follows:

> "[The trial court] has the opportunity to see the parties in person and to hear the witnesses, and [its] decision ought not be upset on appeal absent a clear showing of abuse of discretion." "[The trial court] can detect tenors, tones, and flavors that are lost in the bare printed record read months later by appellate judges."

Surles v. Surles, 113 N.C. App. 32, 36-37, 437 S.E.2d 661, 663 (1993) (quoting *Falls v. Falls*, 52 N.C. App. 203, 209, 278 S.E.2d 546, 551 (1981), *superseded in part by statute on other grounds as noted in Smith v. Smith*, __ N.C. App. __, __, 786 S.E.2d 12, 22 (2016), and *Newsome v. Newsome*, 42 N.C. App. 416, 426, 256 S.E.2d 849, 855 (1979)).

III. Trial Court's Authority to Enter an Order that Differs from the Decision Orally Pronounced by the Court at Trial

[1] At the end of the hearing on this matter, the trial court announced its intention to award primary physical custody of the children to defendant. Upon further consideration, the trial court reached a contrary

conclusion and determined that it would be in the best interest of the children if primary physical custody of the children was granted to plaintiff. Within a week of the hearing, the trial court informed the parties of this change and of its intention to award primary physical custody of the children to plaintiff. Approximately three months later, the trial court entered a written order placing the children in the primary physical custody of plaintiff. On appeal, defendant argues that the trial court lacked the authority to enter an order that did not correspond to its oral statements in court. Simply put, defendant asserts that, as a matter of law, the trial court may not change its mind between the end of a trial or hearing and entry of the order determining the issues raised in that proceeding. In the alternative, defendant contends that the trial court's power to enter an order that differs from its statements in court depends upon the existence of a substantial change of circumstances occurring between the date of the trial court's oral statements and the date that the court enters an order in a case. Defendant's arguments lacks merit.

In support of her position, defendant cites this Court's opinion in *Edwards v. Taylor*, 182 N.C. App. 722, 727, 643 S.E.2d 51, 54 (2007), in which this Court noted that a trial court has the authority to enter a written judgment that "conforms generally" with its oral pronouncement. Defendant contends that this statement necessarily implies its opposite - that the trial court *does not* have authority to enter a written judgment that *does not* generally conform with its statements in court.

Defendant does not cite any authority for this proposition. This issue was recently addressed in *In re O.D.S.*, __ N.C. App. __, 786 S.E.2d 410, *disc. review denied*, __ N.C. __, __ S.E.2d __ (2016 N.C. LEXIS 691), in which this Court expressly rejected the same argument made by defendant in the instant case. In *O.D.S.*, a petition was filed seeking to terminate the respondent's parental rights on grounds of neglect and dependency. At the end of the hearing on the petition, the trial court stated that it found the existence of neglect as a ground for termination, and did not discuss the issue of dependency. The trial court later entered a written order finding the existence of both neglect and dependency as grounds for termination. On appeal, the respondent argued that "the trial court erred because, at the conclusion of the adjudication portion of the hearing, the trial court did not orally state it was finding dependency as a ground for termination, but included that ground in the written order entered [after the hearing.]" *O.D.S.*, __ N.C. App. at __, 786 S.E.2d at 412.

The opinion issued by this Court in *O.D.S.* carefully reviewed the evolution of our Rules of Civil Procedure regarding entry of judgment, noting that:

> Because many of our appellate decisions addressing these issues were based upon rules that have since changed, it is important to note how entry of judgment and notice of appeal from civil judgments have changed in light of revisions to Rule 58 of the North Carolina Rules of Civil Procedure, which became effective 1 October 1994 for "all judgments subject to entry on or after that date." 1994 N.C. Sess. Laws, Ch. 594[.]

O.D.S. at __, 786 S.E.2d at 413. "Entry of judgment based upon oral rendition of judgments is no longer allowed in civil matters; currently, judgments and orders are only 'entered when [they are] reduced to writing, signed by the judge, and filed with the clerk of court.' N.C. Gen. Stat. § 1A-1, Rule 58 (2015)." *Id.* The Court observed that the statement in *Edwards* upon which the instant defendant relies was based upon language in *Morris v. Bailey*, 86 N.C. App. 378, 389, 358 S.E.2d 120, 127 (1987), and stated that "*Morris* [was] discussing a situation when an order was entered orally in open court, then subsequently reduced to writing and filed. . . . Judgments and orders in civil cases can no longer be entered in open court and, therefore, this portion of *Morris* is no longer relevant." *O.D.S.* at __, 786 S.E.2d at 417. In O.D.S., this Court held expressly that:

> Further, the holding in *Edwards* that "[i]f the written judgment conforms generally with the oral judgment, the judgment is valid[,]" *Edwards*, 182 N.C. App. at 727, 643 S.E.2d at 54, *does not command the converse*, i.e. that any written judgment that does not generally conform with the oral judgment is necessarily invalid. Though there may be situations when this is true, we can find no opinion in which it has been held that the written and entered judgment must always generally conform with a prior oral rendition of that judgment in order to be valid. However, as noted above, there are plenary opinions in which our appellate courts have affirmed entered judgments and orders that do not conform to the associated orally rendered judgments and orders.

Id. (emphasis added). We conclude that *O.D.S.* is controlling on the issue of the trial court's authority to enter an order that conflicts with its oral statements in court, that the court did not err by entering an order that reached a conclusion that differed from its oral pronouncement, and that defendant's arguments for a contrary result lack merit.

IV. Trial Court's Determination of the Best Interests of the Children

[2] Defendant also argues that the trial court erred by awarding primary physical custody of the children to plaintiff. Defendant concedes that there had been a substantial change of circumstances, but contends that there was "a mountain of evidence" that made it "appropriate for the trial court to enter an order granting primary physical custody to [defendant]." However, as discussed above, "[i]f the trial court's uncontested findings of fact support its conclusions of law, we must affirm the trial court's order." *Respess*, 232 N.C. App. at 614-15, 754 S.E.2d at 694 (quoting *Mussa v. Palmer-Mussa*, 366 N.C. 185, 191, 731 S.E.2d 404, 409 (2012)). In this case defendant neither challenges the evidentiary support for the trial court's findings of fact nor argues that the court's findings do not support its conclusions of law. We conclude that defendant has failed to make a persuasive argument that the trial court erred by determining that it was in the best interest of the children for plaintiff to be granted their primary physical custody.

For the reasons discussed above, we conclude that the trial court did not err and that its order should be

AFFIRMED

Judges ELMORE and ENOCHS concur.

STATE OF NORTH CAROLINA
v.
OTTIS McGILL, DEFENDANT

No. COA16-296

Filed 18 October 2016

1. Appeal and Error—notice of appeal not timely—petition for writ of certiorari granted

Where defendant stated during his sentencing hearing that he did not want to appeal his convictions and where he did not file written notice of appeal within 14 days after his sentence was imposed in accordance with Rule of Appellate Procedure 4, defendant's notice of appeal was not timely and the Court of Appeals granted the State's motion to dismiss the appeal. The Court did, however, elect to grant defendant's petition for writ of certiorari in order to reach the merits of his appeal.

2. Criminal Law—motion to withdraw guilty plea—denied

On appeal from the trial court's order denying his motion to withdraw his guilty plea and his convictions for two counts of common law robbery and attaining habitual felon status, the Court of Appeals held that defendant failed to establish any of the factors from *State v. Meyer*, 330 N.C. 738 (1992) as weighing in his favor, and so the trial court did not err by denying his motion to withdraw his guilty plea.

3. Criminal Law—guilty plea—factual basis

On appeal from the trial court's order denying his motion to withdraw his guilty plea and his convictions for two counts of common law robbery and attaining habitual felon status, the Court of Appeals rejected defendant's argument that the trial court erred by accepting his guilty plea. There was sufficient factual basis to support his convictions.

Appeal by defendant from order and judgments entered 6 October 2015 by Judge W. Allen Cobb, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 7 September 2016.

Attorney General Roy Cooper, by Special Deputy Attorney General Melody R. Hairston and Assistant Attorney General Teresa M. Postell, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Nicholas C. Woomer-Deters, for defendant-appellant.

ENOCHS, Judge.

Ottis McGill ("Defendant") appeals from the trial court's order denying his motion to withdraw his guilty plea and his convictions for two counts of common law robbery and attaining the status of an habitual felon. On appeal, he contends that the trial court erred in denying his motion to withdraw his guilty plea and erred in finding that a sufficient factual basis existed for accepting his guilty plea. After careful review, we affirm the trial court's order denying Defendant's motion to withdraw his guilty plea and find no error.

Factual Background

On 21 August 2013, Defendant entered a Western Union in Wilmington, North Carolina and demanded money from Calethea Smith ("Smith") who was working at the front counter. Smith gave Defendant

approximately $6,403.00 and Defendant fled the premises. The entire exchange between Defendant and Smith was captured on audio and video surveillance.

Several days later on 6 September 2013, Defendant entered New Bridge Bank in Wilmington and demanded that James Taylor ("Taylor") and Lynn Creech ("Creech") — who were working as tellers at the bank at the time — give him all of the money in their cash drawers. Taylor and Creech complied and gave Defendant approximately $2,250.00. Defendant then fled.

Detectives David Timken ("Detective Timken") and K.J. Tully ("Detective Tully") with the Wilmington Police Department were assigned to investigate the robberies. They consulted with Jeff Martens with the U.S. Marshal Task Force, who informed them that he had been looking for Defendant whom he believed was in the Wilmington area and could have perpetrated the robberies. The detectives obtained a photograph of Defendant, and Detective Timken included Defendant's picture in photographic lineups he administered to Smith, Taylor, and Creech, all of whom positively identified Defendant as the man who had committed the robberies. Defendant was subsequently located and arrested.

On 23 June 2014, Defendant was indicted on two counts of common law robbery and obtaining the status of an habitual felon. Shortly thereafter, the State offered him a plea agreement that would have required him to plead guilty to these charges in exchange for concurrent — as opposed to consecutive — prison sentences.

Defendant declined this plea agreement and trial was scheduled for 30 March 2015. Prior to trial, Defendant moved to suppress the results of the photographic lineups. The trial court denied this motion.

On 30 March 2015, Defendant's case was called for trial before the Honorable Phyllis M. Gorham in New Hanover County Superior Court. Shortly after the jury was empaneled, however, Defendant informed the trial court that he did, in fact, want to enter into a plea deal with the State.

After a discussion with his attorney and the State during a recess in the proceedings, Defendant informed the trial court that he wished to plead guilty to the charges against him and proceeded to do so, signing a transcript of plea. In exchange for his guilty plea, Defendant received a prayer for judgment continued — seemingly so he could provide the State with information he possessed concerning an unrelated criminal case in exchange for a potentially more lenient prison sentence.

During the time period following the entry of his guilty plea and prior to sentencing, Defendant engaged in several interviews with the State concerning the unrelated criminal matter. The State ultimately determined not to use Defendant as a witness in that case, however, and declined to recommend a reduction of his sentence to the trial court.

On 9 April 2015, Defendant filed a *pro se* motion for appropriate relief wherein he requested to withdraw his guilty plea on the ground that his trial counsel had erroneously informed him that if he entered into the guilty plea his sentence would run concurrently with sentences he was set to receive in connection with unrelated criminal convictions in Robeson and Bladen Counties. He further alleged the existence of an undefined conspiracy amongst court appointed attorneys generally to trick their clients into taking unfavorable plea bargains, stating that "[t]his manner of dispensing with criminal cases has become so profound that many lawyers of the Public Defenders [sic] Office and Court appointed Attorney's [sic] have little to no actual trial experience. Rather, these lawyers trick, manipulate and threateningly coerce defendants to enter guilty plea [sic]. Such a conspiracy has taken place in this case."

On 20 April 2015, Defendant was appointed counsel to represent him regarding his motion for appropriate relief. On 24 August 2015, Defendant's newly appointed counsel filed an amended motion for appropriate relief stating that "Defendant asserts his intention to withdraw his plea, but under a Motion to Withdraw a Guilty Plea and not under a Motion for Appropriate Relief."

On 17 and 22 September 2015, an evidentiary hearing was held on Defendant's motion before the Honorable W. Allen Cobb, Jr. in New Hanover County Superior Court. On 6 October 2015, Judge Cobb entered an order concluding that based on the evidence presented, Defendant's motion to withdraw his guilty plea should be denied.

That same day, a sentencing hearing was held before Judge Cobb who sentenced Defendant to two consecutive sentences of 117 to 153 months imprisonment. At the conclusion of the hearing, Defendant's trial counsel attempted to enter oral notice of appeal on Defendant's behalf but was repeatedly interrupted by Defendant in the following exchange:

> THE COURT: Anything further, Mr. Moore?
>
> MR. MOORE: Judge, Mr. McGill would give notice -
>
> THE DEFENDANT: No, no, I would like to file a motion for appropriate relief.

MR. MOORE: Okay. He would like to give --

THE DEFENDANT: No, no, no, Your Honor, excuse me. I would like to file these motions for appropriate relief. I have already wrote the State Bar on Mr. Moore and that was a couple -- that was a while back, you know, and I already done wrote another letter, you know, I've been writing Mr. Moore constantly.

THE COURT: Let the record reflect that the Court, based on the representations of his lawyer, enters notice of appeal to the North Carolina Court of Appeals. The Court appoints the Appellate Defender to perfect his appeal. There will be no appeal bond and if in fact the Court of Appeals affirms anything that may have been done here, then he is free to file any appropriate motion for appropriate relief.

He'll be in your custody, Mr. Sheriff.

THE DEFENDANT: Your Honor, I would like to file this motion for appropriate relief, sir. So you're denying me the right to file the motion?

THE COURT: I don't have the jurisdiction over it. He's in your custody, Mr. Sheriff.

THE DEFENDANT: Okay, is this being documented?

Just deny me a right, my constitutional right to file this motion and you told them to put me down for appeal when I didn't want an appeal at this point in time. I ask you to take the motion.

On 30 March 2016 and 2 May 2016, Defendant filed petitions for writ of *certiorari* with this Court due to his failure to adequately provide notice of his intent to appeal pursuant to Rule 4 of the North Carolina Rules of Appellate Procedure. On 1 June 2016, the State filed a motion to dismiss Defendant's appeal.

Analysis

I. Appellate Jurisdiction

[1] As an initial matter, we must address the issue of whether appellate jurisdiction exists over Defendant's appeal.

> Rule 4 of the North Carolina Rules of Appellate Procedure provides that a defendant may appeal from an order or judgment in a criminal action by (1) "giving oral notice of appeal at trial," or (2) "filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within fourteen days after entry of the judgment[.]"

State v. Holanek, ___ N.C. App. ___, ___, 776 S.E.2d 225, 231 (quoting N.C.R. App. P. 4), *disc. review denied*, 368 N.C. 429, 778 S.E.2d 95 (2015), *cert. denied*, __ U.S. __, 136 S. Ct. 2493, ___ L. Ed. 2d ___ (2016). Where a defendant fails to adequately provide notice of appeal, his appeal is subject to dismissal. However, we may still address the merits of a defective appeal pursuant to Rule 21 of the North Carolina Rules of Appellate Procedure where the defendant files a petition for writ of *certiorari*. *See* N.C.R. App. P. 21(a)(1) ("The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action[.]").

Here, Defendant stated during the sentencing hearing that he did not want to appeal his convictions. Nor did he file written notice of appeal within 14 days after his sentence was imposed in accordance with Rule 4. Consequently, we agree with the State that Defendant's notice of appeal is not timely and grant its motion to dismiss Defendant's appeal. *See State v. Cottrell*, 234 N.C. App. 736, 740, 760 S.E.2d 274, 277-78 (2014) (granting state's motion to dismiss defendant's appeal due to improper notice of appeal, but nevertheless reaching merits of appeal pursuant to Rule 21 upon defendant's filing of petition for writ of *certiorari*).

However, on 30 March 2016 and 2 May 2016, Defendant filed petitions for writ of *certiorari* with this Court seeking appellate review of (1) the denial of his motion to withdraw his guilty plea; and (2) whether a sufficient factual basis existed to allow the trial court to accept his guilty plea. The State has failed to cite any cases precluding our issuing of a writ of *certiorari* under the circumstances of this case, and we are not aware of any.

Indeed, to the contrary, N.C. Gen. Stat. § 15A-1444(e) (2015) states, in pertinent part, that

> [e]xcept as provided in subsections (a1) and (a2) of this section and G.S. 15A-979, and *except when a motion to withdraw a plea of guilty or no contest has been denied*, the defendant is not entitled to appellate review as a

> matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court, but he may petition the appellate division for review by writ of certiorari.

(Emphasis added). Therefore, it is within our discretionary authority under the factual circumstances of the present case as to whether a writ of *certiorari* as to Defendant's petitions should issue. We elect to do so here and grant Defendant's petitions in order to reach the merits of his appeal.[1]

II. Motion to Withdraw Guilty Plea

[2] Defendant first argues on appeal that the trial court erred by denying his motion to withdraw his guilty plea. Specifically, he contends that his trial counsel provided incomplete or erroneous advice concerning habitual felon sentencing which resulted in his misunderstanding the consequences of his guilty plea and also conspired with the State for the purpose of "tricking" him into pleading guilty. We disagree.

> In reviewing a decision of the trial court to deny defendant's motion to withdraw, the appellate court does not apply an abuse of discretion standard, but instead makes an independent review of the record. That is, the appellate court must itself determine, considering the reasons given by the defendant and any prejudice to the State, if it would be fair and just to allow the motion to withdraw.

State v. Marshburn, 109 N.C. App. 105, 108, 425 S.E.2d 715, 718 (1993) (internal citation and quotation marks omitted).

Our Supreme Court has held that "a presentence motion to withdraw a plea of guilty should be allowed for any fair and just reason." *State v. Handy*, 326 N.C. 532, 539, 391 S.E.2d 159, 162 (1990); *State v. Meyer*, 330 N.C. 738, 742-43, 412 S.E.2d 339, 342 (1992) ("Although there is no absolute right to withdraw a guilty plea, withdrawal motions made prior to sentencing, and especially at a very early stage of the proceedings, should be granted with liberality." (internal quotation marks omitted)).

---

1. Moreover, though unnecessary to our determination on this jurisdictional issue, we note that despite the State's contentions to the contrary, we are inclined to agree with Defendant that a contextual reading of the transcript more accurately reflects that he was upset with the trial court's refusal to allow his motion for appropriate relief, as opposed to knowingly and intentionally abandoning any and all future right to appeal the denial of his motion to withdraw his guilty plea.

It is well settled that

> [t]he defendant has the burden of showing that his motion to withdraw is supported by some fair and just reason. Whether the reason is fair and just requires a consideration of a variety of factors. Factors which support a determination that the reason is fair and just include: [1] the defendant's assertion of legal innocence; [2] the weakness of the State's case; [3] a short length of time between the entry of the guilty plea and the motion to withdraw; [4] that the defendant did not have competent counsel at all times; [5] that the defendant did not understand the consequences of the guilty plea; and [6] that the plea was entered in haste, under coercion or at a time when the defendant was confused. If the defendant meets his burden, the court must then consider any substantial prejudice to the State caused by the withdrawal of the plea.

Marshburn, 109 N.C. App. at 108, 425 S.E.2d at 717-18 (internal citations and quotation marks omitted). These factors were first enumerated in *Meyer* and have subsequently been applied by our appellate courts in determining whether the denial of a defendant's motion to withdraw his guilty plea was proper. However, our Supreme Court in *Meyer* also emphasized that the State need not even demonstrate on appeal that a reversal of the trial court's denial of a defendant's motion to withdraw his guilty plea would cause it to suffer substantial prejudice "until the defendant has asserted a fair and just reason why he should be permitted to withdraw his guilty pleas." 330 N.C. at 744, 412 S.E.2d at 343. We address each of the *Meyer* factors in turn.

A. Defendant's Assertion of Legal Innocence

In the present case, Defendant's motion to withdraw his guilty plea was not based upon his assertion of legal innocence. Instead, as noted above, Defendant merely alleged that his attorney misled him by incorrectly explaining the law to him as it pertains to habitual felon sentencing and that she conspired with the State to "trick" him into accepting a guilty plea.

Significantly, our research has failed to produce a single case in which our appellate courts have found that the trial court erred in denying a defendant's motion to withdraw his guilty plea where the defendant did not, as a ground for his motion, assert his legal innocence. *See*, *e.g.*, *State v. Chery*, 203 N.C. App. 310, 691 S.E.2d 40 (2010); *State v. Watkins*, 195 N.C. App. 215, 672 S.E.2d 43 (2009); *State v. Villatoro*, 193 N.C. App.

65, 666 S.E.2d 838 (2008); *State v. Graham*, 122 N.C. App. 635, 471 S.E.2d 100 (1996).

Indeed, our Supreme Court expressly addressed the significant weight accorded this factor in *Meyer*:

> Perhaps most importantly, defendant in this case, unlike the defendant in *Handy*, has not asserted his "legal innocence." In *Handy*, the defendant pleaded guilty to felony murder based on the underlying charge of armed robbery. The following morning, the defendant told the trial judge that he had felt "under pressure" to plead guilty, and that after praying about it overnight and talking with his mother and attorneys, he believed he was not actually guilty of first-degree murder. In this case, defendant sought to withdraw his guilty pleas not because he believed he was innocent of the crimes charged, but because of the extensive media coverage generated by his escape.

330 N.C. at 744, 412 S.E.2d at 343 (internal citation omitted); *see also Chery*, 203 N.C. App. at 319, 691 S.E.2d at 47 (holding where defendant did not assert his innocence and "[o]ur independent review of the record in this case reveal[ed] that the reason for defendant's motion to withdraw his plea was that his co-defendant . . . was found not guilty of all charges" that "[t]he trial court properly denied defendant's motion to withdraw his plea"). Therefore, Defendant's failure to establish this factor as a reason why his motion to withdraw his guilty plea should have been granted weighs heavily against him under the *Meyer* analysis.

B. Strength of the State's Case

Defendant next argues that the State's case was weak and that, as a result, we should find the second *Meyer* factor weighs in his favor. Specifically, Defendant contends that the photographic lineup evidence forecast by the State was tainted pursuant to N.C. Gen. Stat. § 15A-284.52(a)(3) and (b)(1) (2015) given that Detective Timken — the officer who first interviewed the bank tellers — also administered the photographic lineups to them. Subsection (b)(1) of N.C. Gen. Stat. § 15A-284.52 provides that

> [l]ineups conducted by State, county, and other local law enforcement officers shall meet all of the following requirements:
>
> (1) A lineup shall be conducted by an independent administrator or by an alternative method as provided by subsection (c) of this section.

Subsection (a)(3) defines an independent administrator as "[a] lineup administrator who is not participating in the investigation of the criminal offense and is unaware of which person in the lineup is the suspect."

We first note that Defendant moved to suppress the photographic lineups evidence pursuant to the above statute during a pretrial motion. The motion was denied by the trial court and Defendant has not appealed the trial court's decision to allow the photographic lineups into evidence. Therefore, any argument as to its admissibility on appeal is deemed abandoned. *See State v. Brown*, 217 N.C. App. 566, 569, 720 S.E.2d 446, 449 (2011) ("If a defendant does not give specific notice of his intent to appeal a motion to suppress, then the defendant has waived the right to appellate review.").

Even assuming *arguendo*, however, that the photographic lineups had been suppressed and excluded from the State's evidence, we are still not convinced that the State's case would have been considered "weak." The State's forecast of evidence also included audio and video recordings of the Western Union robbery and additional witnesses present during the robberies who were prepared to testify that Defendant had been the perpetrator. As a result, we hold that Defendant has failed to sufficiently establish the second factor of the *Meyer* test.

C. Timeliness of Motion

Defendant next argues that his motion was filed within a short time after the entry of his guilty plea weighing in favor of a finding that he had had a "sudden change of heart" as to his guilty plea. We disagree.

> Our appellate courts have placed heavy reliance on the length of time between a defendant's entry of the guilty plea and motion to withdraw the plea. The reasoning behind this reliance was articulated in *Handy*:
>
> > A swift change of heart is itself strong indication that the plea was entered in haste and confusion; furthermore, withdrawal shortly after the event will rarely prejudice the Government's legitimate interests. By contrast, if the defendant has long delayed his withdrawal motion, and has had the full benefit of competent counsel at all times, the reasons given to support withdrawal must have considerably more force.

Chery, 203 N.C. App. at 317, 691 S.E.2d at 46 (internal citation and quotation marks omitted) (quoting *Handy*, 326 N.C. at 539, 391 S.E.2d at 163).

It is undisputed that Defendant waited nine days to file his *pro se* motion to withdraw his guilty plea during which time he provided details to the State concerning an unrelated case in an attempt to obtain a reduction in his sentence. It was only after the State ultimately declined to offer him a reduction that he resolved to withdraw his guilty plea.

This does not represent the type of sudden change of heart necessary to establish a fair and just reason that he should be allowed to withdraw his guilty plea. Nor does it reflect that Defendant was confused or entered his guilty plea in haste. Instead, it reflects a well thought out and calculated tactical decision on Defendant's part to attempt to obtain a more lenient sentence after his endeavor to receive a sentence reduction by cooperating with the State did not bear fruit. *See id.* at 318, 691 S.E.2d at 46 ("Although defendant's letter seeking to withdraw his plea was sent to Judge Jenkins only nine days after its entry, the facts of this case do not show that this desire was based upon a swift change of heart as contemplated by *Handy*. Defendant executed the plea transcript approximately three and a half months prior to the plea hearing. There is no indication in the record that during this time defendant wavered on this decision. It was only after [his co-defendant] was found not guilty of all charges did defendant decide that he wished to withdraw his plea." (internal quotation marks and brackets omitted)).

Moreover, the terms of the plea deal itself were unambiguous. This Court has held that " '[i]n analyzing plea agreements, contract principles will be wholly dispositive because neither side should be able . . . unilaterally to renege or seek modification simply because of uninduced mistake or change of mind.' " *State v. Robinson*, 177 N.C. App. 225, 231, 628 S.E.2d 252, 256 (2006) (quoting *State v. Lacey*, 175 N.C. App. 370, 372, 623 S.E.2d 351, 352-53 (2006)). Defendant cannot, therefore, unilaterally undo the plea agreement because he no longer deems it advantageous based upon collateral matters. *See Marshburn*, 109 N.C. App. at 109, 425 S.E.2d at 718 ("To be relevant, defendant must show that the misunderstanding related to the *direct consequences* of his plea, not a misunderstanding regarding the effect of the plea on some collateral matter.").

Consequently, Defendant's deliberate tactical decision to wait to withdraw his guilty plea until after the State determined not to offer him a reduction in his sentence due to his cooperation in the unrelated criminal matter belies his assertion that he had a sudden change of heart of the type we have held to weigh in a defendant's favor under *Meyer*. As a result, we find this factor also does not weigh in his favor.

D. Comprehension of Guilty Plea's Terms

Defendant next contends that he was operating under a misapprehension of the law as it related to habitual felon sentencing due to his trial counsel's incorrect legal advice which he claims was intentionally provided pursuant to a broad, yet undefined, conspiracy that court appointed attorneys in North Carolina have entered into with the State in order to trick criminal defendants into entering into unfavorable guilty pleas. We find this assertion in Defendant's motion to withdraw his guilty plea inherently absurd, but nevertheless proceed to address whether he did, in fact, comprehend the terms of his guilty plea.

Perhaps most fundamentally, we observe that despite Defendant's insistence that he was misled and misinformed in entering into his guilty plea, Defendant's trial counsel testified that prior to his doing so she fully informed him of the following:

> Q. Did you ever discuss with Mr. McGill the plea for 25 to 39 months to run consecutive if he gave information on the murder?
>
> A. I don't recall that. I know at some point there was discussion about getting his other charges in the other counties to run concurrent with this, and then I researched it and found out that you can't do that, because nothing can run concurrent, and other charges can't, if it's habitual, and relayed that to him.
>
> Q. So at some point, though, you told him that you thought they could run concurrent?
>
> A. Right. We talked about it and I researched it and told him that can't happen.

Defendant also unequivocally stated during a colloquy with the trial court the following prior to entering into his guilty plea:

> THE COURT: Have the charges been explained to you by your lawyer?
>
> THE DEFENDANT: Yes, ma'am.
>
> THE COURT: Do you understand the nature of the charges?
>
> THE DEFENDANT: Yes, ma'am.
>
> THE COURT: Have you and your lawyer discussed the possible defenses to the charges?

THE DEFENDANT: Yes, ma'am.

THE COURT: Are you satisfied with your lawyer's services?

THE DEFENDANT: Yes, ma'am.

. . . .

THE COURT: Do you understand that you are pleading guilty to two counts of common law robbery, each count being a Class C felony, each count punishable by up to 231 months, and habitual felon status for a total maximum punishment of 462 months in the custody of the North Carolina Department of Corrections?

THE DEFENDANT: Yes, ma'am.

THE COURT: Do you now personally plead guilty?

THE DEFENDANT: Yes, ma'am.

THE COURT: Are you in fact guilty?

THE DEFENDANT: Yes, ma'am.

THE COURT: Have you agreed to plead guilty as a part of a plea arrangement?

THE DEFENDANT: Yes, ma'am.

THE COURT: The prosecutor and your lawyer have informed the Court of the following terms and conditions of your plea. That you will plead guilty to the charges listed above and receive a prayer for judgment continued.

Is this correct as being your full plea arrangement?

THE DEFENDANT: Yes, ma'am.

THE COURT: Do you now personally accept this arrangement?

THE DEFENDANT: Yes, ma'am.

THE COURT: Other than the plea arrangement between you and the prosecutor, has anyone promised you anything or threatened you in any way to cause you to enter this plea against your wishes?

THE DEFENDANT: No, ma'am.

> THE COURT: Do you enter this plea of your own free will?
>
> THE DEFENDANT: Yes, ma'am.
>
> THE COURT: Do you have any questions about what has just been said to you?
>
> THE DEFENDANT: No, ma'am.

Based on the above-quoted exchanges, we are satisfied that the record plainly and unambiguously shows that Defendant was fully informed of the consequences of accepting his plea deal and did so both knowingly and voluntarily. Therefore, he has failed to establish this factor of the *Meyer* test as weighing in his favor as well.

E. Ineffective Assistance of Counsel

We next consider whether Defendant received effective assistance of counsel. As noted above, Defendant's trial counsel was fully prepared for trial and had fully advised and informed Defendant of the terms of the State's plea deal. She had also fully and accurately informed Defendant of the law as it pertained to habitual felon sentencing and the impossibility of receiving concurrent sentences with his convictions in other counties.

Moreover, it was *Defendant himself* who insisted on entering into a guilty plea with the State after he was dissatisfied with the jurors who were selected to try him. This was evidenced through his trial counsel's testimony at the hearing on his motion to withdraw his guilty plea:

> Q. Did you feel that Mr. McGill was under pressure when he accepted the plea?
>
> A. I'm sure everyone who takes a plea is under pressure, but that was his decision. We talked about it thoroughly. I did not want him to take a plea, and that's what he wanted to do.

Defendant's trial counsel was optimistic about trying the case and fully prepared to do so. Nevertheless, Defendant insisted on entering into a plea deal, most likely due to his belief that he could receive a sentence reduction if he cooperated with the State by providing information about the unrelated criminal matter. As a result, Defendant's trial counsel had no choice but to acquiesce to his desire to enter a plea of guilty. *See State v. Grooms*, 353 N.C. 50, 85, 540 S.E.2d 713, 735 (2000) (" '[W]hen counsel and a fully informed criminal defendant client reach

an absolute impasse as to such tactical decisions, the client's wishes must control; this rule is in accord with the principal-agent nature of the attorney-client relationship.' " (quoting *State v. Ali*, 329 N.C. 394, 404, 407 S.E.2d 183, 189 (1991))). Consequently, Defendant cannot demonstrate based on the record that he received ineffective assistance of counsel.

F. Coercion, Haste, or Confusion

Based on our above analysis, we are satisfied that Defendant was fully informed of the consequences of his decision to plead guilty and did so knowingly and voluntarily free from any coercive influence or material misrepresentation. There is also no evidence whatsoever of Defendant being forced into entering into the guilty plea in haste. Moreover, there is no evidence in the record that Defendant received ineffective assistance of counsel. Consequently, we hold that Defendant has failed to establish this *Meyer* factor as weighing in his favor as well.

In summary, because Defendant has failed to establish any of the *Meyer* factors as weighing in his favor, we hold that the trial court did not err in denying his motion to withdraw his guilty plea. Defendant's arguments on this issue are overruled.

III. Trial Court's Acceptance of Guilty Plea

[3] Defendant's final argument on appeal is that the trial court erred in accepting his guilty plea because there was not a sufficient factual basis to support his convictions. We disagree.

> Pursuant to N.C. Gen. Stat. § 15A-1022(c) (2011), a trial court may not accept a plea of guilty without first determining that there is a factual basis for the plea. This determination may be based upon information including, but not limited to, a statement of the facts by the prosecutor, a written statement of the defendant, an examination of the presentence report, sworn testimony, which may include reliable hearsay, or a statement of facts by the defense counsel. The five sources listed in the statute are not exclusive, and therefore the trial judge may consider any information properly brought to his attention.

State v. Collins, 221 N.C. App. 604, 606, 727 S.E.2d 922, 924 (2012) (internal citation, quotation marks, and ellipses omitted).

Here, Defendant stipulated that a factual basis existed to support his guilty plea. He then stipulated to the State's summary of the factual basis which it proceeded to provide. After the State had entered its summary

into the record at trial, the trial court asked Defendant if there were any additions or corrections to the account that he would like to make. Defendant responded in the negative.

This procedure is sufficient to enable the trial court to find that a factual basis exists for Defendant's guilty plea. *See id.* at 607, 727 S.E.2d at 925 ("We conclude that the summary of the facts presented by the prosecutor and [d]efendant's stipulations are sufficient to establish a factual basis for [d]efendant's guilty plea."). Consequently, Defendant's argument on this issue is without merit.

Conclusion

For the reasons stated above, we affirm the trial court's order denying Defendant's motion to withdraw his guilty plea and find no error.

AFFIRMED.

Judges ELMORE and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
ERIC MOORE

No. COA16-377

Filed 18 October 2016

Satellite-Based Monitoring—no evidence of prior offenses

Where the trial court ordered that defendant be subject to satellite-based monitoring for the remainder of his natural life, the Court of Appeals vacated the order and remanded for an evidentiary hearing because no evidence was presented to the trial court that defendant had obtained the required prior sexual offense convictions to be classified as a recidivist, and defense counsel's statements and arguments did not stipulate to the prior convictions.

Appeal by defendant from order entered 27 October 2015 by Judge Thomas D. Haigwood in Pitt County Superior Court. Heard in the Court of Appeals 21 September 2016.

Attorney General Roy Cooper, by Special Deputy Attorney General Joseph Finarelli, for the State.

William D. Spence for defendant-appellant.

TYSON, Judge.

Eric Moore ("Defendant") appeals from the trial court's order, which imposed satellite-based monitoring ("SBM") for the remainder of Defendant's natural life. We reverse the SBM order, and remand.

I. Background

On 27 October 2015, Defendant appeared before the trial court for a determination of whether he should be required to enroll in the SBM program pursuant to N.C. Gen. Stat. § 14-208.40(a). The prosecutor orally informed the court that Defendant had two relevant prior convictions. According to the prosecutor's statement, Defendant was convicted of second-degree sexual offense in 1989. In 2006, Defendant was convicted of attempted second-degree sexual offense. The trial court found Defendant is a recidivist, and ordered him to enroll in SBM for the remainder of his natural life.

II. Issues

Defendant argues the trial court erred by: (1) finding that Defendant obtained two prior convictions and he is a recidivist, where the findings are not supported by competent evidence; and (2) finding both of Defendant's prior convictions are "reportable convictions" under N.C. Gen. Stat. § 208.6(4) where both offenses occurred prior to 1 December 2006.

III. Standard of Review

"[W]e review the trial court's findings of fact [of an order on SBM] to determine whether they are supported by competent record evidence, and we review the trial court's conclusions of law for legal accuracy and to ensure that those conclusions reflect a correct application of law to the facts found." *State v. Kilby*, 198 N.C. App. 363, 367, 679 S.E.2d 430, 432 (2009) (citation and quotation marks omitted). This Court reviews the trial court's interpretation and application of the statutory procedure to impose SBM *de novo*. *State v. Davison*, 201 N.C. App. 354, 357, 689 S.E.2d 510, 513 (2009), *disc. review denied*, 364 N.C. 599, 703 S.E.2d 738 (2010).

IV. Evidence of Defendant's Prior Convictions

Defendant argues the trial court erred by finding he is a recidivist, where the only evidence the State presented to the court was the oral statement of the prosecutor that Defendant had obtained reportable offenses in 1989 and 2006. We agree.

If an individual has been convicted of certain "reportable" offenses as defined by N.C. Gen. Stat. § 14-208.6(4) and no prior court has determined whether he is required to enroll in SBM, the Department of Adult Corrections is required to make an initial determination of whether the offender falls into one of the three alternate categories set forth in N.C. Gen. Stat. § 14-208.40(a). N.C. Gen. Stat. § 14-208.40B(a) (2015).

If the Department of Adult Corrections preliminarily determines the individual meets the criteria for SBM enrollment, prior notice is provided, and the matter is scheduled to be heard before the superior court. N.C. Gen. Stat. § 14-208.40B(b). "At the hearing, the court shall determine if the offender falls into one of the categories described in [N.C. Gen. Stat. §] 14-208.40(a). The court shall hold the hearing and make findings of fact pursuant to [N.C. Gen. Stat. §] 14-208.40A." N.C. Gen. Stat. § 14-208.40B(c) (2015).

N.C. Gen. Stat. § 14-208.40A sets forth the procedures the trial court must follow to determine whether the offender meets the requirements for the court to order SBM. The statute provides the "district attorney shall present to the court any *evidence*" that the offender falls into one of the enumerated categories. N.C. Gen. Stat. § 14-208.40A(a) (2015) (emphasis supplied). "After receipt of the *evidence* from the parties, the court shall determine whether the offender's conviction places the offender in one of the categories described in [N.C. Gen. Stat. §] 14-208.40(a)." N.C. Gen. Stat. § 14-208.40A(b) (emphasis supplied).

Neither the Judgment and Commitment for Defendant's 1989 conviction, nor his 2006 conviction, or any certified transcript of Defendant's prior offenses, were offered into evidence at the SBM hearing. These records were also not contained in the Pitt County Clerk of Court's file for this hearing. Defendant's "Computerized Criminal History," contained in the record on appeal, was also not offered into evidence.

The State concedes neither witness testimony nor documentary "evidence" was presented to establish Defendant's prior criminal history, and that statements made to the court by the prosecutor and defense counsel constituted the only basis to find Defendant had been convicted of two qualifying sexual offenses.

When the State called the case before the court, the following exchange occurred:

> PROSECUTOR: I have verified his complete criminal history and I've verified the GPS arrangement with him.

> THE COURT: All right. I'll be happy to hear you ma'am.
>
> PROSECUTOR: Your Honor, he qualified for lifetime satellite-based monitoring based on the fact that he is a recidivist. He has two convictions. One 2006 for sexual offense secondary attempted, and in 1989 he was convicted of sexual offense again again [sic], second degree and served a sentence . . . .
>
> THE COURT: So you're asking me to [impose] lifetime satellite based monitoring?
>
> PROSECUTOR: Yes, we are.

An unnamed probation officer was present "just to answer questions" and responded to the court that Defendant was a "high risk of rearrest, level 2, [and], the Static 99 was moderate to low risk with a score of 3." Defense counsel then addressed the court and argued the imposition of lifetime SBM on Defendant is unreasonable and unconstitutional, and also argued Defendant is not a recidivist as defined by the statute.

Defense counsel stated during his argument to the court:

> I would submit to the Court that it an (inaudible) factor and especially in this case where he got two convictions, one conviction that he required to register and the second conviction that didn't, would not had [sic] been based on offense date or conviction date (inaudible) prior to have satellite-based monitoring. He calls in (inaudible) released from prison on or after the effective date of the new law or portion of that.

Defense counsel later stated:

> [G]iven the totality of circumstances as it applies to, [Defendant] that it's unreasonable, sir. He has two (inaudible) some years apart, one that didn't even require him to register. He served a period of time . . . in prison for that, got out, and obviously, and Your Honor, can tell he was not required to register for the first one and I have a registration printout off . . . the website, doesn't require him to register for the first one. You can tell he didn't spend a tremendous amount of time in prison (inaudible). Then fast forward to 2006 . . . and he's convicted of attempted second degree rape in Lenoir County, serves several years in prison, gets out (inaudible), he's on what I presume is

> five years (inaudible). He's being supervised. They know where he is . . . . [W]hen you look at Static 99 he comes back as a (inaudible). This is not someone who comes in with Static 99 who is at high risk for re-offending. . . . Your Honor, . . . you can see in 1999 [sic] he was only 19 years old at the time. Very, very young.

The State argues Defendant's counsel identified and discussed the prior convictions at the SBM hearing in the course of his argument to the court. The State asserts defense counsel's argument was a stipulation and furnished the trial court with sufficient "evidence" to conclude Defendant is a recidivist as defined by the statute.

A. Required Proof

"An unilateral statement by the solicitor may not be considered as evidence." *State v. Powell*, 254 N.C. 231, 235, 118 S.E.2d 617, 620 (1961); *see also State v. Wilson*, 340 N.C. 720, 727, 459 S.E.2d 192, 196 (1995) (unsworn statement of the prosecutor insufficient to support an award of restitution). Something more than unsworn statements, which are unsupported by any documentation, is required as evidence under the statute to allow the trial court to impose lifetime SBM on an individual. The State concedes no "evidence" was presented by the prosecutor to the trial court of Defendant's prior convictions.

The Supreme Court of the United States has recently reviewed and discussed the search and seizure implications of North Carolina's SBM program on an individual's freedom under the Fourth Amendment. *Grady v. North Carolina*, __ U.S. __, __ 191 L. Ed. 2d 459, 461-62 (2015) ("The State's [SBM] program is plainly designed to obtain information. And since it does so by physically intruding on a subject's body, it effects a Fourth Amendment search.")

This Court has previously explained: "A stipulation to prior convictions has been held as sufficient for purposes of determining prior record level in felony sentencing, which is a criminal proceeding; we believe that if this proof is sufficient for sentencing purposes, it is also sufficient for purposes of SBM, which is a civil regulatory proceeding." *State v. Arrington*, 226 N.C. App. 311, 316, 741 S.E.2d 453, 457 (2013) (citing *State v. Powell*, 223 N.C. App. 77, 80, 732 S.E.2d 491, 494 (2012)). The question before us is whether defense counsel's statements to the court constituted a stipulation to Defendant's two prior convictions to allow the trial court to impose lifetime SBM.

B. Defendant's Stipulations

Our Supreme Court has held that a mere prior record level worksheet submitted to the trial court by the State, is insufficient, standing alone, to establish a defendant's prior record level. *State v. Alexander*, 359 N.C. 824, 827, 616 S.E.2d 914, 917 (2005). In numerous cases, this Court has addressed whether oral statements of defense counsel constituted a stipulation to the defendant's prior convictions, which supports the defendant's prior record level. An oral exchange between defense counsel and the court following presentation of the prior record level worksheet may constitute a stipulation the defendant obtained the prior convictions as shown on the worksheet. *Id.* at 828-29, 616 S.E.2d at 917.

" 'While a stipulation need not follow any particular form, its terms must be definite and certain in order to afford a basis for judicial decision, and it is essential that they be assented to by the parties or those representing them. Silence, under some circumstances, may be deemed assent . . . .' " *Id.* (quoting *Powell*, 254 N.C. at 234, 118 S.E.2d at 619).

In *Alexander*, the Court held that defense counsel's statements to the court demonstrated he "was cognizant of the contents of the worksheet, but also that he had no objections to it." *Id.* at 830, 616 S.E.2d at 918. *See also State v. Eubanks*, 151 N.C. App. 499, 506, 565 S.E.2d 738, 743 (2002) ("[T]he statements made by the attorney representing defendant in the present case may reasonably be construed as a stipulation by defendant that he had been convicted of the charges listed on the worksheet."); *State v. Hanton*, 140 N.C. App. 679, 690, 540 S.E.2d 376, 383 (2000) (defense counsel's statement that there was no disagreement about the defendant's prior convictions "might reasonably be construed as an admission by defendant that he had been convicted of the other charges appearing on the prosecutor's work sheet").

In all the aforementioned cases, the State had presented the court with a prior record level worksheet, which contained the date and a description of the prior convictions, the classes of offense, the file numbers, and the county where each conviction was obtained. Here, the State produced and presented nothing but a bare oral assertion of Defendant's prior convictions.

A statement by defense counsel may constitute a stipulation where it is "definite and certain." *State v. Mumford*, 364 N.C. 394, 403, 699 S.E.2d 911, 917 (2010). The State is statutorily required to "present to the court any evidence" that the offender falls into one of the enumerated categories to impose SBM. N.C. Gen. Stat. § 14-208.40A(a). Here,

the State failed to present "evidence" or sufficient information to allow Defendant to enter a "definite and certain" stipulation. *Mumford*, 364 N.C. at 403, 699 S.E.2d at 917.

No evidence was presented to the trial court, upon which the court could have determined Defendant had obtained the required prior sexual offense convictions to be classified as a recidivist, and defense counsel's statements and arguments did not stipulate to the prior convictions. We vacate the trial court's lifetime SBM order, and remand for a proper evidentiary hearing, required by law. N.C. Gen. Stat. § 14-208.40A(a)-(b).

V. Conclusion

The State presented no evidence to support the trial court's finding and conclusion Defendant had two prior sexual offense convictions, which classifies him as a recidivist, nor did Defendant enter a "definite and certain" stipulation on this issue. *Mumford*, 364 N.C. at 403, 699 S.E.2d at 917. The trial court's order is vacated and this matter is remanded. In light of our holding, we do not address Defendant's remaining argument.

VACATED AND REMANDED.

Judges CALABRIA and DAVIS concur.

STATE OF NORTH CAROLINA
v.
MARCUS ALAN PARSON

No. COA16-502

Filed 18 October 2016

1. Search and Seizure—affidavit—good faith of affiant

Where the trial court denied defendant's motion to suppress evidence seized during the execution of a search warrant, the Court of Appeals rejected his argument on appeal that the affidavit attached to the application for the search warrant contained material omissions and statements made in reckless disregard for the truth. The officer relied in good faith on information that other officers provided to her.

2. Search and Seizure—affidavit—nexus between objects sought and place to be searched

Where the trial court denied defendant's motion to suppress evidence seized during the execution of a search warrant, the Court of Appeals held that the affidavit attached to the application for the search warrant failed to include facts or circumstances to sufficiently connect the address to be searched with any illegal activity or Defendant's purported operation of a clandestine methamphetamine laboratory.

3. Search and Seizure—good faith exception to exclusionary rule—not applicable to violations of N.C. Constitution

Where the trial court denied defendant's motion to suppress evidence seized during the execution of a search warrant and the search warrant was invalid due to lack of probable cause, the good faith exception to the exclusionary rule did not apply for the violation to the N.C. Constitution.

Appeal by defendant from judgment entered 5 January 2016 by Judge Mark E. Powell in Haywood County Superior Court. Heard in the Court of Appeals 21 September 2016.

Attorney General Roy Cooper, by Assistant Attorney General Ashish K. Sharda, for the State.

Meghan Adelle Jones for defendant-appellant.

TYSON, Judge.

Marcus Alan Parson ("Defendant") appeals from judgment entered after the trial court denied his motion to suppress. Defendant pled guilty to trafficking methamphetamine by manufacturing, possession of methamphetamine precursor chemicals, and manufacturing methamphetamine, subject to and preserving his right to appeal the trial court's denial of his motion to suppress. We reverse and remand.

I. Factual Background

On 28 October 2014, Defendant was indicted for trafficking methamphetamine by manufacturing, trafficking methamphetamine by possession, manufacturing methamphetamine, felony conspiracy to manufacture methamphetamine, maintaining a vehicle/dwelling/place

for controlled substances, and possession of methamphetamine precursor chemicals.

Defendant filed a motion to suppress the evidence seized during execution of the search warrant. Defendant argued the affidavit attached to the application for the search warrant did not show probable cause linking the property located at 394 Low Gap Road to the evidence being sought. Defendant also argued the affiant acted in bad faith or reckless disregard of the facts when preparing and presenting the application and affidavit for the search warrant.

A. Affidavit

State Bureau of Investigation ("SBI") Special Agent Casey Drake prepared the application for the search warrant and the accompanying affidavit. This case was her first occasion to draft an application for a search warrant for a suspected methamphetamine laboratory. She consulted with other investigating officers to prepare the application and form her statement to show probable cause. Her statement in support of probable cause outlined the following facts.

On 10 September 2014 at 3:30 p.m., Defendant purchased "Decongestant 12hr Max" from a local Wal-Mart store. Fifteen minutes later, Julie Brown ("Brown") purchased the same product at the same location. Officers with several different law enforcement agencies established surveillance of Defendant and Brown.

The officers observed Defendant and Brown being picked up by a vehicle driven by James Stratton, the registered owner, with one other person. Defendant and his companions travelled to several stores, including an ABC Store, a dollar store, and a convenience store. Defendant purchased dog food at the dollar store, but the officers did not observe what was purchased at the convenience store.

The four briefly returned to Stratton's residence at 59 Fie Top Road and removed items from the trunk. Stratton and Defendant left again to purchase drinks at a gas station. Brown remained at 59 Fie Top Road.

The affidavit states that prior to returning to 59 Fie Top Road, "Stratton dropped [Defendant] at the burned [sic] residence and blue recreational vehicle/motor home located at 394 Low Gap Road, Maggie Valley, North Carolina." At 6:25 p.m. Haywood County Sheriff's Sergeant Mease and another detective established surveillance at 394 Low Gap Road. Approximately thirty minutes later, they observed Defendant exit the recreational vehicle and walk in the direction towards 59 Fie Top Road. Two other officers approached Defendant as he was walking and

informed him they had information that Defendant was "cooking methamphetamine." Defendant denied this allegation and refused to allow the officers to search the "burned" house or the recreational vehicle.

Around the same time the officers were questioning Defendant, Haywood County Sheriff's Detective McAbee and SBI Special Agent Drake conducted a "knock and talk" conversation with the occupants of 59 Fie Top Road, including Brown and Stratton. Brown acknowledged she had purchased pseudoephedrine earlier that day with Defendant, and that she buys pseudoephedrine to treat her allergies on a regular basis.

Brown stated Defendant had "went home," but she did not know what he was doing there. Although Brown did not know where the pseudoephedrine she had purchased was located, she "presumed" it was with Defendant inside the grocery bags. Brown also admitted that she had used methamphetamine in the past. Stratton allowed the officers to walk around the home located at 59 Fie Top Road with him, but refused to consent to a full search.

The affidavit also contains allegations asserting Defendant and Brown had previously purchased similar products at similar times in the past. Both Defendant and Brown had previously been "blocked" from purchasing pseudoephedrine in the past, indicating they had each exceeded the maximum amount of pseudoephedrine allowed to be purchased within a thirty-day time period. The affidavit further alleges that Brown, not Defendant, had previously purchased other items "consistent with the manufacturing of methamphetamine."

The affidavit briefly addresses the criminal histories of Defendant and Brown. It stated that Defendant and Brown each had previous charges for methamphetamine in Holmes County, Florida. Brown had been convicted and sentenced to three years of probation. Defendant had no previous convictions. Finally, the affiant makes a general statement regarding her knowledge and experience of clandestine methamphetamine laboratories.

Judge Letts signed the search warrant at 10:32 p.m. on 10 September 2014 and it was executed at 11:37 p.m. The search recovered components consistent with a clandestine methamphetamine laboratory.

B. Additional Testimony Presented at Suppression Hearing

The trial court received additional testimony during the suppression hearing from Sergeant Mease and SBI Special Agent Drake. The court acknowledged much of this testimony pertained to information

outside the "four-corners of the search warrant." As a result, the court only relied on this additional information "to the extent that it bears upon any issues of good or bad faith on the part of the applicant, Special Agent Drake."

Sergeant Mease testified he received an email alert from the National Precurser Log Exchange ("NPLEx"), which reported Defendant had legally purchased a pseudoephedrine product at a Wal-Mart pharmacy in Waynesville. Fifteen minutes later, another detective received a similar NPLEx email that Brown had legally purchased a similar pseudoephedrine product at the same location. Defendant and Brown's addresses were both listed as 394 Low Gap Road on these alerts. Sergeant Mease testified he was familiar with both Defendant and Brown and had been "investigating" them for approximately four years prior to 10 September 2014.

Law enforcement officers have access to the records of pseudoephedrine purchases collected by NPLEx and can create "watches" to alert them when a particular individual purchases a pseudoephedrine product. SBI Special Agent Tritt created the NPLEx alert for Defendant. To create the NPLEx email "watch," Special Agent Tritt entered Defendant's full name, approximate age, and address. Sergeant Mease testified the address that appears on the left side of the alerts is the address entered by the officer who created the "watch."

Both Sergeant Mease and Special Agent Drake were questioned at the suppression hearing regarding the assertion in the affidavit that Stratton had dropped Defendant off at 394 Low Gap Road. Sergeant Mease testified he only suspected Defendant had been dropped off at 394 Low Gap Road. Sergeant Mease based this suspicion on the return time of the vehicle and his knowledge that Defendant lived "up at that area." None of the officers followed Stratton's vehicle up the mountain or personally observed Stratton drop Defendant off at 394 Low Gap Road or anywhere else. Agent Drake confirmed other residences are located on Low Gap Road in addition to 394 Low Gap Road. Sergeant Mease conveyed much of the information used in the application for the search warrant to Special Agent Drake.

C. Trial Court's Order Denying Motion to Suppress

The trial court denied Defendant's motion to suppress and made several findings of fact to support its conclusion that the affidavit was based upon probable cause. The relevant portions of the trial court's order are as follows:

10c. That on September 10, 2014 at approximately 3 30 [sic] pm, Sergeant Meese received an email from NPLEx that Marcus Alan Parson of 394 Low Gap Road in Maggie Valley, North Carolina had purchased a pseudoephedrine product at Wal-Mart Pharmacy #1663 in Waynesville, North Carolina.

10d. That on September 10, 2014 at approximately 3 45 [sic] pm, Detective Jeff Mackey with the Maggie Valley Police Department received an email from NPLEx that Julie Anne Brown of 394 Low Gap Road in Maggie Valley, North Carolina had purchased a pseudoephedrine product at Wal-Mart Pharmacy #1663 in Waynesville, North Carolina. . . .

. . .

10g. . . . At 540 [sic] pm, Stratton's vehicle returned to 59 Fie Top Road but Defendant was no longer in the vehicle. *Neither Drake nor any other law enforcement officer saw Stratton drop off Defendant at the residence at 394 Low Gap Road.* (emphasis supplied)

10h. That at approximately 6:25 pm, Sergeant Mease and his partner, Detective Micah Phillips, set up surveillance upon the residence located at 394 Low Gap Road. Sergeant Mease knew that residence to be Defendant's. . . .

10i. . . . Brown admitted to Special Agent Drake that she purchased pseudoephedrine with Defendant that day and that she takes it on a regular basis for her allergies Brown said she did not know where the pseudoephedrine was but she presumed that it must be with the groceries with Defendant Brown stated that she and Defendant had gotten into an argument, and that he had gone home She did not know what he was doing. . . .

. . .

10n. That prior to Special Agent Drake's return to the residence with the search warrant, Defendant overheard that she was on the way over the officers' radio transmission. . . .

. . .

> 13d. That with respect to the issue of a nexus between the property to be searched, to wit. 394 Low Gap Road, and the fair probability that evidence related to the manufacture of methamphetamine would be located there, the Court finds that there is a sufficient connection. The search warrant states that Julie Brown told Special Agent Drake that Defendant had "went home", presumably with the pseudoephedrine products Defendant left the 59 Fie Top Road residence in Stratton's vehicle and went in the direction of the 394 Low Gap Road evidence [sic] The vehicle returned to 59 Fie Top Road and Defendant was no longer in the vehicle. Law enforcement believed that Defendant went to that residence and, in fact, set up surveillance and actually saw him there in a short timeframe. And finally, Defendant exercised control and dominion over the residence at 394 Low Gap Road by refusing law enforcement's request to conduct a warrantless search there. The Court finds, that in the totality of the circumstances, there is a sufficient connection between the property to be searched and a fair probability that evidence of a crime would be found there.
>
> Conclusions of Law
>
> . . .
>
> 3. That the search warrant application complied in all respects with N.C. Gen. Stat § 15A-244 Specifically, the Court finds that the affidavit of probable cause contained sufficient facts to support a fair probability that evidence of the crimes of manufacturing methamphetamine and possessing methamphetamine precursor chemicals would be found at the property located at 394 Low Gap Road in the Town of Maggie Valley, Haywood County, North Carolina. The information contained in the affidavit was timely and provided ample-connection between the property, Defendant's possessory interest of the same, and evidence of contraband and criminal activity.

After the trial court denied his motion to suppress, Defendant pled guilty to trafficking in methamphetamine by manufacturing, possession of precursor chemicals, and manufacturing methamphetamine, preserving his right to appeal the denial of his motion to suppress. The trial court sentenced Defendant to a minimum of 225 months and a maximum of 282 months of active imprisonment and imposed a $250,000.00

fine. Defendant appeals from the trial court's order denying his motion to suppress.

II. Issues

Defendant argues the trial court erred in denying his motion to suppress because: (1) the affidavit contained material omissions and statements made in reckless disregard for the truth; and, (2) the affiant failed to implicate 394 Low Gap Road with the crime alleged and objects sought.

III. Good Faith of Affiant

A. Standard of Review

[1] "A factual showing sufficient to support probable cause requires a truthful showing of facts." *State v. Severn*, 130 N.C. App. 319, 322, 502 S.E.2d 882, 884 (1998) (citing *Franks v. Delaware*, 438 U.S. 154, 164-65, 57 L.Ed.2d 667, 678 (1978)). N.C. Gen. Stat. § 15A-978(a) provides:

> A defendant may contest the validity of a search warrant and the admissibility of evidence obtained thereunder by contesting the truthfulness of the testimony showing probable cause for its issuance. . . . For the purposes of this section, truthful testimony is testimony which reports in good faith the circumstances relied on to establish probable cause.

N.C. Gen. Stat. § 15A-978(a) (2015).

B. Analysis

This Court has clarified that a "truthful showing of facts" does not require " 'that every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant's own knowledge that sometimes must be garnered hastily.' " *State v. Fernandez*, 346 N.C. 1, 13, 484 S.E.2d 350, 358 (1997) (quoting *Franks*, 438 U.S. at 165, 57 L.Ed.2d at 678)). This Court has also recognized an affiant officer's ability to rely upon information reported to her by other officers in the performance of their duties. *See State v. Horner*, 310 N.C. 274, 280, 311 S.E.2d 281, 286 (1984).

"Instead, truthful means that the information put forth is believed or appropriately accepted by the affiant as true." *Severn*, 130 N.C. App. at 322, 502 S.E.2d at 884 (internal quotation marks and citation omitted). This Court has further held that "every false statement in an affidavit

is not necessarily made in bad faith. An affiant may be unaware that a statement is false and therefore include the statement in the affidavit based on a good faith belief of its veracity." *Id.* at 323, 502 S.E.2d at 885.

Prior to a hearing to determine the veracity of the facts contained within the affidavit, a defendant "must make a preliminary showing that the affiant knowingly, or with reckless disregard for the truth, made a false statement in the affidavit." *Fernandez*, 346 N.C. at 14, 484 S.E.2d at 358. If a further evidentiary hearing is held, only the affiant's veracity is at issue at that hearing. *Id.* A defendant's claim asserting the affidavit contained false statements made knowingly or in reckless disregard for the truth, "is not established merely by evidence that contradicts assertions contained in the affidavit, or even that shows the affidavit contains false statements. Rather, the evidence must establish facts from which the finder of fact might conclude that *the affiant alleged the facts in bad faith*." *Id.* (emphasis supplied).

If a defendant establishes by a preponderance of the evidence that such statements were made in bad faith by the affiant in order to obtain a search warrant, the false information contained in the affidavit must be set aside. *Severn*, 130 N.C. App. at 322-23, 502 S.E.2d at 884 (citing *Franks*, 438 U.S. at 155-56, 57 L.Ed.2d at 672). Once these statements are omitted, " '[i]f the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.' " *Severn*, 130 N.C. App. at 323, 502 S.E.2d at 884 (quoting *Franks*, 438 U.S. at 156, 57 L.Ed.2d at 672).

In the affidavit at bar, SBI Special Agent Drake stated "Stratton dropped [Defendant] at the burned [sic] residence and blue recreational vehicle/motor home located at 394 Low Gap Road, Maggie Valley, North Carolina." Defendant argues this statement must be excised from the court's probable cause determination as it was made in reckless disregard for the truth. We disagree.

Although the trial court found that "[n]either Drake nor any other law enforcement officer saw Stratton drop off Defendant at the residence at 394 Low Gap Road," the trial court also recognized that it does not necessarily follow that Special Agent Drake made this statement in bad faith. *See Severn*, 130 N.C. App. at 323, 502 S.E.2d at 885. Special Agent Drake's testimony during the suppression hearing, used to determine whether she had acted in good faith, clarified she received much of the information to draft the application for the search warrant from other officers participating in the surveillance of Defendant.

Special Agent Drake testified she never observed Defendant being dropped off at 394 Low Gap Road, but had received this information via radio from another officer. Defendant presents no additional evidence and there is nothing in Special Agent Drake's testimony to indicate she made the contested statement in bad faith or that she did not believe this information to be true at the time she wrote the affidavit.

Defendant has the initial burden of showing that Special Agent Drake's statement was made in reckless disregard for the truth. *See Fernandez*, 346 N.C. at 14, 484 S.E.2d at 358. The trial court found and the record evidence indicates Special Agent Drake relied in good faith on the information the other officers provided to her. *See Horner*, 310 N.C. at 280, 311 S.E.2d at 286. Defendant failed to meet his burden to show otherwise. Defendant's arguments are overruled.

IV. Trial Court's Order Denying the Motion to Suppress

A. Standard of Review

[2] This Court's review of a trial court's denial of a motion to suppress "is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding." *State v. Chukwu*, 230 N.C. App. 553, 561, 749 S.E.2d 910, 916 (2013) (internal quotation marks and citation omitted). The trial court's "conclusions of law are reviewed *de novo* and are subject to a full review, under which this Court considers the matter anew and freely substitutes its own judgment for that of the trial court." *State v. Knudsen*, 229 N.C. App. 271, 281, 747 S.E.2d 641, 649, *disc. review denied*, 367 N.C. 258, 749 S.E.2d 865 (2013).

Our Supreme Court adopted the "totality of the circumstances" test for determining whether information properly before the magistrate provided a sufficient basis for finding probable cause to issue a search warrant. *State v. Arrington*, 311 N.C. 633, 641, 319 S.E.2d 254, 259 (1984). "When reviewing a magistrate's determination of probable cause, this Court must pay great deference and sustain the magistrate's determination if there existed a substantial basis for the magistrate to conclude that articles searched for were probably present." *State v. Hunt*, 150 N.C. App. 101, 105, 562 S.E.2d 597, 600 (2002) (citations omitted). This deference "is not without limitation. A reviewing court has the duty to ensure that a magistrate does not abdicate his or her duty by 'mere[ly]

ratif[ying] . . . the bare conclusions of [affiants].' " *State v. Benters*, 367 N.C. 660, 665, 766 S.E.2d 593, 598 (2014) (quoting *Illinois v. Gates*, 462 U.S 213, 239, 76 L.Ed.2d 527, 549).

B. Analysis

Article 1, Section 20 of the North Carolina Constitution provides that "[g]eneral warrants, whereby any officer or other person may be commanded to search suspected places without evidence of the act committed, . . . are dangerous to liberty and shall not be granted." N.C. Const. art. I, sec. 20.

A search warrant application "must be supported by one or more affidavits particularly setting forth the facts and circumstances establishing probable cause to believe that the items are in the places or in the possession of the individuals to be searched." N.C. Gen. Stat. § 15A-244(3) (2015). Probable cause for a search may exist where the stated facts in a search warrant "establish reasonable grounds to believe a search of the premises will reveal the items sought and that the items will aid in the apprehension or conviction of the offender." *Fernandez*, 346 N.C. at 13, 484 S.E.2d at 358 (citations omitted). Probable cause requires "more than bare suspicion." *Brinegar v. United States*, 338 U.S. 160, 175, 93 L. Ed. 1879 (1949).

The affidavit "must establish a nexus between the objects sought and the place to be searched." *State v. Oates*, 224 N.C. App. 634, 644, 736 S.E.2d 228, 235 (2012) (citation omitted), *appeal dismissed and disc. review denied*, 366 N.C. 585, 740 S.E.2d 473 (2013); *see State v. Allma*n, __ N.C. App. __, 781 S.E.2d 311 (2016). Generally, "this connection is made by showing that criminal activity actually occurred at the location to be searched or that the fruits of a crime that occurred elsewhere are observed at a certain place." *Oates*, 224 N.C. App. at 644, 736 S.E.2d at 235 (citation omitted). "Nowhere has either this Court or the United States Supreme Court approved an affidavit for the issuance of a search warrant that failed to implicate the premises to be searched." *Campbell*, 282 N.C. at 131-32, 191 S.E.2d at 757; *see e.g.*, *United States v. Harris*, 403 U.S. 573, 29 L.Ed.2d 723 (1971); *Rugendorf v. United States*, 376 U.S. 528, 11 L.Ed.2d 887 (1964); *State v. Bullard*, 267 N.C. 599, 148 S.E.2d 565 (1966), *cert. denied*, 386 U.S. 917, 17 L.Ed.2d 789 (1967).

When making a determination of probable cause, the magistrate may not consider evidence outside the four corners of the affidavit, unless "the information is either recorded or contemporaneously summarized in the record or on the face of the warrant by the issuing official." N.C. Gen. Stat. § 15A-245(a) (2015). Our Supreme Court has stated

it was error for a reviewing court to "rely upon facts elicited at the [suppression] hearing that [go] beyond 'the four corners of [the] warrant.'" *Benters*, 367 N.C. at 673-74, 766 S.E.2d at 603.

i. Challenged Findings of Fact

Defendant argues Findings of Fact 10(c), 10(d), 10(h), and 10(n) were not supported by competent evidence. In Findings of Fact 10(c) and 10(d), Defendant challenges the trial court's finding that the NPLEx emails listed Defendant and Brown's address as 394 Low Gap Road. Defendant argues the testimony shows the officers, not NPLEx, enter the address information in the alerts and this information is not independently verified by NPLEx.

Whether the addresses listed in the NPLEx records were provided or independently verified by NPLEx or individually entered by the officers is unclear from our review of the record. However, these findings of fact clearly do not support the trial court's conclusion that the affidavit showed probable cause to search 394 Low Gap Road. Our case law does not allow the trial court to rely on facts outside "the four corners of the warrant" in making its probable cause determination. *See Benters*, 367 N.C. at 673-74, 766 S.E.2d at 603. The affidavit in this case only indicated both Defendant and Brown legally purchased decongestant from a Wal-Mart store on 10 September 2014. The affidavit never mentioned that this information was received via the NPLEx alerts or that any specific address was connected with these purchases.

In Finding of Fact 10(h), Defendant contends the statement that "Sergeant Mease knew that residence to be Defendant's" was critical in establishing a required nexus between the objects sought and the place to be searched, but that this finding was not supported by competent evidence. Evidence in the record is conflicting regarding Sergeant Mease's knowledge that the address 394 Low Gap Road was, in fact, Defendant's residence. Sergeant Mease testified at one point that the vehicle continued up the mountain "toward [Defendant's] residence at 394 Low Gap Road," but later testified he only suspected that Defendant was dropped off at 394 Low Gap Road, because he knew Defendant lived "up at that area." While a "reasonable mind" could have concluded Sergeant Mease knew this was Defendant's address, *see Chukwu*, 230 N.C. App. at 561, 749 S.E.2d at 916, this testimony could not be used by the trial court to find the affidavit established probable cause. *See Benters*, 367 N.C. at 674, 766 S.E.2d at 603. Nothing in Special Agent Drake's affidavit mentioned Sergeant Mease's knowledge of Defendant's address. *See id.*

We do not address Finding of Fact 10(n), as the State notes this finding relates to an action made by Defendant after the search warrant had been issued and is immaterial to this Court's determination of whether probable cause existed at the time to support the issuance of the search warrant. Ultimately, the findings of fact challenged by Defendant were based upon evidence outside the four corners of the warrant and could not be used by the trial court in making its probable cause determination. *See Benters*, 367 N.C. at 673-74, 766 S.E.2d at 603.

ii. Affidavit Does Not Support Probable Cause

Second, Defendant argues the application for the search warrant and attached affidavit failed to sufficiently connect the property located at 394 Low Gap Road to the objects sought. We agree.

This case is similar to *State v. Campbell*, wherein the Supreme Court observed that "[n]owhere in the affidavit is there any statement that narcotic drugs were ever possessed or sold in or about the dwelling to be searched" and that "[n]owhere in the affidavit are any underlying circumstances detailed from which the magistrate could reasonably conclude that the proposed search would reveal the presence of illegal drugs in the dwelling." *Campbell*, 282 N.C. at 131, 191 S.E.2d at 757. As such, the Court in *Campbell*, concluded that the facts alleged did not support an inference that narcotic drugs were illegally possessed on the premises. *Id. Campbell* controls where "the affidavit . . . included no information indicating that drugs had been possessed in or sold from the dwelling to be searched." *State v. McKinney*, 368 N.C. 161, 166, 775 S.E.2d 821, 826 (2015); *see Allman*, __ N.C. App. at __, 781 S.E.2d at 316-17 (affirming the trial court's order granting a defendant's motion to suppress where the affidavit contained no allegations evidencing the probable presence of drugs or observations of activity suggestive of drug trafficking or usage at the place to be searched).

Here, Sergeant Mease initiated surveillance based upon NPLEx email alerts he and another officer had received, which alerted them that both Defendant and Brown had legally purchased pseudoephedrine at the same location within 15 minutes of one another. The affidavit and probable cause determination heavily relied on the information gleaned from that surveillance. However, only four allegations in the affidavit specifically refer to 394 Low Gap Road and none of these allegations establish the required nexus between the objects sought, i.e., evidence of a clandestine methamphetamine laboratory, and the place to be searched, i.e., the property located at 394 Low Gap Road. *See Oates*, 224 N.C. App. at 644, 736 S.E.2d at 235.

The affidavit alleged "Stratton dropped [Defendant] at the burned [sic] residence and blue recreational vehicle/motor home located at 394 Low Gap Road, Maggie Valley, North Carolina." The affidavit then alleged that officers "established surveillance in the wooded area across the road from the 394 Low Gap Road residence . . . [and] saw [Defendant] exit the recreational vehicle and start walking down the road toward Fie Top Road," and that "SA M.L. Tritt and Detective Michael Whitley simultaneously approached [Defendant] walking away from 394 Low Gap Road." Finally, the affidavit alleged that "[d]uring the encounter with [Defendant] on the roadside near 394 Low Gap Road . . . SA Tritt asked for consent to search his house and recreational vehicle and [Defendant] refused consent."

These allegations were not sufficient for either the magistrate or the trial court to find probable cause existed to search the residence or recreational vehicle located at 394 Low Gap Road. While Special Agent Drake testified that the affidavit references 394 Low Gap Road as Defendant's residence, this simply is not the case. The affidavit states that during Special Agent Drake's conversation with Brown, Brown informed her that Defendant "went home." Nothing in the affidavit provides context to where Defendant's "home" was or that his "home" was 394 Low Gap Road, which is where the affidavit claims he was dropped off. However, even taken from the view of the magistrate, the simple fact that an individual is dropped off at a particular address does not establish probable cause to search that address in the absence of other allegations of criminal activity.

The fact that Defendant left the recreational vehicle and began walking away from property located at that address fails to provide reasonable suspicion of any criminal activity or evidence subject to seizure. Although the affidavit alleged that Brown presumed the purchased pseudoephedrine was with Defendant in the grocery bags, Brown admitted that she did not actually know where the pseudoephedrine was located. The affidavit never asserts the officers observed anything in Defendant's behavior or possession—such as drug paraphernalia, grocery bags, receipts for cold medicine purchases, or any precursors or contraband—which would cause them to suspect Defendant was operating a clandestine methamphetamine laboratory or conducting any other illegal activity on property located at 394 Low Gap Road.

While Defendant's refusal of the officer's request to search the property may tend to show Defendant's ownership or control over the property, an individual's refusal to provide consent to search a property does not establish probable cause to search. *See Florida v. Bostick*,

501 U.S. 429, 437, 115 L. Ed. 2d 389, 400 (1991) (A "refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or a seizure."). None of these four allegations, standing alone or taken under the "totality of the circumstances," specifically allege a sufficient connection to the property located at 394 Low Gap Road to provide the issuing official with probable cause to issue a warrant to search the premises. *See Arrington*, 311 N.C. at 641, 319 S.E.2d at 259.

Further, even the additional allegations contained within the affidavit regarding Defendant and Brown's criminal histories and previous purchases of pseudoephedrine and other related products do not support any inference that illegal activity had occurred or was happening on the property at 394 Low Gap Road. *See Oates*, 224 N.C. App. at 644, 736 S.E.2d at 235.

The affidavit attached to the application for the search warrant failed to include "facts or circumstances" to sufficiently connect the property located at 394 Low Gap Road with any illegal activity or Defendant's purported operation of a clandestine methamphetamine laboratory. *See* N.C. Gen. Stat. § 15A-244(3). Prior precedents never validated an affidavit for the issuance of a search warrant that failed to implicate the premises to be searched with criminal activity. *Campbell*, 282 N.C. at 131-32, 191 S.E.2d at 757; *see* N.C. Const. art. I, sec. 20. We cannot do so here.

V. Good Faith Exception to the Exclusionary Rule

[3] Under the "good faith" exception to exclusionary rule, a search warrant ultimately determined to be invalid due to a lack of probable cause will be upheld when "officers acted in objectively reasonable reliance on a warrant issued by a detached and neutral [judge][.]" *State v. Witherspoon*, 110 N.C. App. 413, 421, 429 S.E.2d 783, 788 (1993) (citation and quotation marks omitted). The good faith exception to the exclusionary rule applies where evidence is suppressed pursuant to a provision of the federal Constitution. *State v. McHone*, 158 N.C. App. 117, 122-23, 580 S.E.2d 80, 84 (2003) (citing *United States v. Leon*, 468 U.S. 897, 82 L.Ed.2d 677, reh'g denied, 468 U.S. 1250, 82 L.Ed.2d 942 (1984); *State v. Welch*, 316 N.C. 578, 342 S.E.2d 789 (1986)).

Our Supreme Court has held that no good faith exception exists to the exclusionary rule for violations of the North Carolina Constitution, stating:

> North Carolina, however, justifies its exclusionary rule not only on deterrence but upon the preservation of the

> integrity of the judicial branch of government and its tradition based upon fifty years' experience in following the expressed public policy of the state. Under the judicial integrity theory, our constitution demands the exclusion of illegally seized evidence. The courts cannot condone or participate in the protection of those who violate the constitutional rights of others.

State v. Carter, 322 N.C. 709, 723, 370 S.E.2d 553, 561 (1988). The Supreme Court has also declined to extend this "good faith" exception to cases involving violations of N.C. Gen. Stat. § 15A. *McHone*, 158 N.C. App. at 123, 580 S.E.2d at 84; *see State v. Hyleman*, 324 N.C. 506, 510-11, 379 S.E.2d 830, 833 (1989) (holding that failure of the affidavit to comply with N.C. Gen. Stat. §15A-244(3) was a substantial violation and the good faith exception to the exclusionary rule did not apply).

Here, the affidavit failed to properly set forth "facts and circumstances establishing probable cause" as required under N.C. Gen. Stat. §15A-244(3) and the North Carolina Constitution. As noted in *Hyleman*, "[t]he exclusion of illegally seized evidence is the greatest deterrent to similar violations in the future." *Hyleman*, 324 N.C. at 510, 379 S.E.2d at 833 (citation omitted). The good faith exception to the exclusionary rule does not apply in this case. *See id.*

VI. Conclusion

Special Agent Drake did not act in bad faith when she submitted her application for a search warrant and attached the affidavit for determination of probable cause. The affidavit failed to establish the required nexus between the objects sought, evidence of a clandestine methamphetamine laboratory, and the place to be searched, the property located at 394 Low Gap Road. *See Oates*, 224 N.C. App. at 644, 736 S.E.2d at 235. The issuing judge erred in his determination that the application and affidavit provided probable cause to issue the search warrant.

The trial court should have granted Defendant's motion to suppress. The judgment Defendant appeals from is reversed. This cause is remanded to the trial court for entry of an order allowing Defendant's motion to suppress. *It is so ordered.*

REVERSED AND REMANDED.

Judges CALABRIA and DAVIS concur.

STATE OF NORTH CAROLINA, PLAINTIFF
v.
DRAYTON LAMAR THOMPSON, DEFENDANT

No. COA16-94

Filed 18 October 2016

1. Evidence—deceased victims—statements to medical personnel—corroborated by statements to police officer

Where defendant was convicted in 2015 of sexual offenses committed in 1991 against three women—two of whom (Alice and Patricia) had died of natural causes in the intervening time—the trial court did not err by admitting the statements made by Alice and Patricia to a police officer to corroborate the women's statements to medical personnel who treated them at the time of the assaults. The statements were admissible for corroboration purposes, and there was sufficient evidence to support submission of the various charges to the jury based on the witnesses' statements to medical personnel and on the overwhelming statistical likelihood that defendant's DNA matched that found on the victims.

2. Criminal Law—motion seeking funds to hire expert to retest DNA samples

Where defendant was convicted in 2015 of sexual offenses committed in 1991 against three women, the trial court did not abuse its discretion by denying defendant's motion seeking funds with which to hire an expert to retest the DNA samples.

3. Criminal Law—jury instructions—acting alone or in together with another

Where defendant was convicted in 2015 of sexual offenses committed in 1991 against three women, the trial court did not commit plain error by instructing the jury in such a manner that defendant could be found guilty either by acting by himself or acting together with another.

Appeal by defendant from judgments entered 11 September 2015 by Judge Hugh B. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 11 August 2016.

Attorney General Roy Cooper, by Assistant Attorney General Catherine F. Jordan, for the State.

Massengale & Ozer, by Marilyn G. Ozer, for defendant-appellant.

ZACHARY, Judge.

Defendant appeals from judgments entered upon the following convictions: (1) two counts of first-degree rape, one count of first-degree sex offense, and one count of second-degree kidnapping committed against "Alice"; (2) two counts of first-degree rape and one count of first-degree kidnapping committed against "Patricia"; and (3) two counts of first-degree sex offense, one count of first-degree kidnapping, one count of first-degree rape, and one count of conspiracy to commit first-degree kidnapping and first-degree rape, committed against "Louise".[1] The offenses were committed by two men in 1991. Defendant was charged in 2012, after forensic testing revealed a match between defendant's DNA profile and DNA evidence collected at the time of the offenses. On appeal, defendant argues that the trial court erred by admitting the statements given by Patricia and Alice to a law enforcement officer and by denying his request for funds with which to retain an expert in order to retest the DNA samples. Defendant also asserts that the trial court committed plain error in its instructions to the jury. We conclude that the trial court did not err by admitting the witnesses' statements or by denying defendant's motion seeking funds with which to retain an expert to retest the DNA evidence, and did not commit error or plain error in its instructions to the jury.

I. Factual and Procedural Background

In 1991, Alice, Patricia, and Louise were kidnapped and subjected to sexual assault in separate incidents. On 17 December 2012, defendant was indicted for the following offenses:

> 1. Three counts of first-degree rape, two counts of first-degree sex offense, and one count of first-degree kidnapping, committed against Patricia.
>
> 2. Three counts of first-degree rape, one count of first-degree sex offense, and one count of second-degree kidnapping, committed against Alice.
>
> 3. One count of first-degree rape, three counts of first-degree sex offense, one count of first-degree kidnapping,

1. To preserve the privacy of the victims, we will use pseudonyms in this opinion.

and one count of conspiracy to commit first-degree kidnapping and first-degree rape, committed against Louise.

Defendant was tried before a jury beginning on 26 August 2015. Prior to trial, three different attorneys were appointed to represent defendant. The first two were removed at defendant's request. When defendant expressed dissatisfaction with his third appointed counsel, the trial court ruled that defendant had forfeited his right to be represented by appointed counsel. Defendant represented himself at trial, with his third appointed attorney serving as standby counsel. Defendant does not raise any appellate issue regarding his *pro se* representation.

At the outset of trial, the State sought to join for trial the charges pertaining to Alice, Patricia, and Louise. Although defendant opposed joinder of the charges, he has not challenged the joinder on appeal. The trial took place twenty-four years after the offenses were committed, during which time Alice and Patricia had died of natural causes. Louise testified at trial about the offenses committed against her. The evidence establishing the commission of criminal offenses against Alice and Patricia came from statements they made to medical personnel at the time of the assaults. The trial court also admitted as corroborative evidence the statements made by Alice and Patricia to Charlotte Police Major LaFreda Lester.

The trial evidence established factual similarities among the cases. All of the charged offenses occurred in Charlotte between May and August, 1991. In each case, an African-American woman in her twenties was walking in Charlotte late at night, and was kidnapped by two African-American men driving a car. In each instance, after the victim was in the car she was blindfolded, attacked, and threatened. The two men drove each of the women to a house in an unknown location, where both men sexually assaulted the victim. All three women were subjected to both forced vaginal intercourse and forced oral sex. Following the assaults, the men allowed the victims to get dressed, drove them to a different location, and let them out of the car. In each case, the victim did not recognize either of the attackers, and no suspects were arrested in 1991. Forensic examination later revealed a statistically significant match between defendant's DNA profile and DNA evidence collected from each victim in 1991. Finally, in each case, the victim gave statements to medical personnel describing the kidnapping and sexual assaults. Additional factual details about the offenses are discussed below, as relevant to the issues raised on appeal.

Prior to submitting the charges to the jury, the prosecutor dismissed one charge of first-degree rape committed against Alice, and the trial court dismissed one charge of first-degree rape and one charge of first-degree sex offense committed against Patricia, as well as one charge of first-degree sex offense committed against Louise. On 11 September 2015, the jury found defendant guilty of: (1) one count of first-degree kidnapping and two counts of first-degree rape of Patricia; (2) one count of first-degree sex offense, one count of second-degree kidnapping, and two counts of first-degree rape of Alice; and (3) one count of conspiracy to commit first-degree kidnapping and first-degree rape, two counts of first-degree sex offense, one count of first-degree kidnapping, and one count of first-degree rape of Louise. The jury found defendant not guilty of one count of first-degree sex offense of Patricia.

Because the offenses were committed in 1991, defendant was sentenced under the Fair Sentencing Act. The trial court imposed three consecutive sentences of life imprisonment: a consolidated sentence in cases Nos. 12 CRS 55384-85 and 12 CRS 55391; a second consolidated sentence of life imprisonment in cases Nos. 12 CRS 55383, 12 CRS 253233, 12 CRS 25324, 12 CRS 253235, and 12 CRS 253237; and a third consolidated life sentence in cases Nos. 12 CRS 55387-89, and 12 CRS 55394. The court also ordered defendant to register as a sex offender for the remainder of his life and to enroll in satellite-based monitoring if he were released from prison. Defendant gave notice of appeal in open court.

II. Admission of Statements by Deceased Witnesses to Major Lester

[1] Defendant argues first that the trial court erred by admitting the statements made by Alice and Patricia to Major Lester to corroborate the women's statements to medical personnel. Defendant contends that the statements were "not corroborative as they were used by the State and the court for the truth of the matter asserted in the statements" and that the admission of these statements "violated [defendant's] constitutional guarantee to confrontation" under the North Carolina and United States Constitutions. Defendant does not challenge the admission of Louise's statement to Major Lester, as Louise was available for cross-examination at trial. Therefore, this issue pertains only to defendant's convictions for offenses committed against Alice and Patricia. We conclude that the trial court did not err by admitting the witnesses' statements as corroboration of their statements to medical personnel.

A. Preservation of Constitutional Issue

We first address the State's argument that defendant failed to preserve for appellate review his argument that admission of these statements violated his rights under the Sixth Amendment to the United States Constitution. When Major Lester was asked to read Patricia's statement, defendant objected to the introduction of Patricia's statement and asked to be heard outside the presence of the jury. The trial court overruled defendant's objection and denied his request to be heard. After Major Lester read the statement, defendant addressed the trial court outside of the jury's presence and moved for a mistrial on the grounds that he was unable to cross-examine Patricia. Defendant read aloud from the discussion in *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177 (2004), concerning the constitutional right to cross-examine the declarant of a statement introduced for substantive purposes. The trial court ruled that Patricia's statement to Major Lester was admissible to corroborate her statements to medical personnel and denied defendant's motions for a mistrial and to exclude the statement. Defendant also objected to the introduction of Alice's statement to Major Lester. We conclude that defendant properly preserved this issue for our review.

B. Standard of Review

"When a defendant objects to the admission of evidence, we consider, whether the evidence was admissible as a matter of law, and if so, whether the trial court abused its discretion in admitting the evidence." *State v. Blackwel*l, 207 N.C. App. 255, 257, 699 S.E.2d 474, 475 (2010). "The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009), *disc. review denied*, 363 N.C. 857, 694 S.E.2d 766 (2010).

C. Discussion

Defendant argues that the trial court erred by admitting the statements of Alice and Patricia to Major Lester, on the grounds that the statements were not admitted as corroborative evidence. Defendant contends that the admission of these statements violated his right to confront the witnesses against him as guaranteed by the Sixth Amendment to the United States Constitution. We disagree.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2015). "As a general rule, hearsay is inadmissible at trial." *State v. Morgan*, 359 N.C. 131, 154, 604 S.E.2d 886, 900 (2004). In *Crawford v. Washington*,

541 U.S. 36, 158 L. Ed. 2d 177 (2004), the United States Supreme Court held that the admission of an out-of-court testimonial statement made by an unavailable declarant who did not testify at trial and who was not previously available for cross-examination by the defendant is barred by the Confrontation Clause of the Sixth Amendment. However:

> "[If] evidence is admitted for a purpose other than the truth of the matter asserted," such as when evidence is admitted solely for purposes of corroboration, then "the protection afforded by the Confrontation Clause against testimonial statements is not at issue." . . . According to our Supreme Court, North Carolina case law establishes "the rule that prior consistent statements are admissible even though they contain new or additional information so long as the narration of events is substantially similar to the witness' in-court testimony."

State v. Ross, 216 N.C. App. 337, 346-47, 720 S.E.2d 403, 409 (2011) (quoting *State v. Walker*, 170 N.C. App. 632, 635, 613 S.E.2d 330, 333 (2005), and *State v. Williamson*, 333 N.C. 128, 136, 423 S.E.2d 766, 770 (1992)), *disc. rev. denied*, 366 N.C. 400, 735 S.E.2d 174 (2012). "Prior statements admitted for corroborative purposes are not to be received as substantive evidence." *State v. Harrison*, 328 N.C. 678, 681, 403 S.E.2d 301, 303-04 (1991) (citation omitted). "[A]dmission of nonhearsay raises no Confrontation Clause concerns.' *State v. Gainey*, 355 N.C. 73, 87, 558 S.E.2d 463, 473 (2002).

The trial court admitted statements by Alice and Patricia to the health care personnel who treated them at the time of the assaults, under the exception to the hearsay rule contained in Rule 803(4), for statements given for purposes of medical diagnosis or treatment. Defendant does not challenge the admission of these statements, and the witnesses' statements to Major Lester were admitted to corroborate their statements to medical personnel. We conclude that the challenged statements meet the requirements for admission as corroborative evidence.

Patricia was treated by Nurse Janet Gillespie, who testified at trial. Nurse Gillespie testified that Patricia told her that at around 2:30 a.m. on 7 May 1991, she was walking near a location in Charlotte known as The Plaza, when she accepted a ride with two African-American men whom Patricia did not know. When Patricia got into the front seat of the car, the man in the back seat put a towel over her head and an iron bar against her neck. The men drove to a house where they led Patricia inside with the towel over her head. The men forced her to engage in

vaginal intercourse and fellatio. Patricia was also treated by Dr. David Maxwell Gray, who testified as an expert in emergency medicine. Dr. Gray's testimony included the following summary of Patricia's statements to him:

> Dr. Gray: She says she was walking home and accepted a ride in a car that had two men in it. One moved to the backseat when she got in the front seat, and she was attacked from behind with a crowbar across her neck. That part I remember. And she had a towel put over her head and was driven -- actually, I'll read it word for word, I'm sorry.
>
> . . .
>
> Dr. Gray: Was attacked from behind with a crowbar in front of neck. Attackers put a towel over patient's head and took patient to house. . . . One placed a penis in her mouth and then had vaginal intercourse, and the second attacker repeated the same things as the first attacker but with the addition of attempting anal intercourse.

Major Lester testified that on 7 May 1991, she took a statement from Patricia, who told Major Lester that she had accepted a ride with two unknown African-American men. After Patricia got into the car, the men put a towel over her head and choked her with an iron bar. The men took Patricia to a house where they forced her to engage in vaginal intercourse and fellatio. Patricia's statement to Major Lester included additional details about the incident, but was substantially similar to her statements to medical personnel.

Alice was treated by Nurse Gillespie and Dr. Russell Howard Greenfield. On 19 July 1991, Alice told Nurse Gillespie that she had been sexually assaulted by two unknown African-American men a few hours earlier. The men had threatened her with a knife, choked and blindfolded her, and subjected her to forcible vaginal intercourse, anal intercourse, and fellatio. Dr. Greenfield testified as an expert in emergency medicine. Alice told Dr. Greenfield that she and her sister had voluntarily gotten into a car with two men. When Alice's sister got out of the car at a convenience store, the passenger in the car covered Alice's head, choked her, and threatened to stab her. The men took Alice to a house and raped her. Dr. Greenfield testified that the results of his pelvic examination of Alice were consistent with her having been sexually assaulted by two men.

Major Lester took a statement from Alice on 16 July 1991. Alice told Major Lester that earlier that night she and her sister got into a car with

two unknown African-American men. After a short drive, Alice's sister got out of the car. A man in the car then covered Alice's head, choked her, hit her with his fist, and threatened to stab her. They drove her to a house where both men forced her to engage in vaginal intercourse. One man also attempted to have anal intercourse and placed his penis in her mouth. We conclude that Alice's statement to Major Lester was substantially similar to her statements to health care personnel.

Based upon our review of the transcript of this case, we conclude that the statements by Patricia and Alice to Major Lester were properly admitted to corroborate their statements to the medical personnel who treated them shortly after each witness was sexually assaulted. In reaching this conclusion, we have carefully considered defendant's arguments for a contrary result.

On appeal, defendant does not argue that the statements of Patricia and Alice to Major Lester were inadmissible as corroborative evidence because the statements contradicted, rather than corroborated, the witnesses' statements to medical personnel. Defendant contends, however, that the trial court "must not consider the corroborative nature of the statement when determining whether it qualifies as an exception to hearsay." Defendant cites *State v. Champion*, 171 N.C. App. 716, 722, 615 S.E.2d 366, 371 (2005), in support of this position. In *Champion*, however, the issue was whether a statement qualified under the residual hearsay exception in N.C. Gen. Stat. § 8C-1, Rule 804(b)(5). *Champion* does not hold that the trial court should not consider the corroborative nature of a statement in determining whether it falls within the exception for *corroborative* statements.

Defendant's primary argument is that the statements contained additional information not included in the witnesses' statements to health care workers and that the statements were admitted as substantive evidence for the truth of these additional details, rather than as corroborative evidence. However, the mere fact that a corroborative statement contains additional facts not included in the statement that is being corroborated does not render the corroborative statement inadmissible:

> "In order to be admissible as corroborative evidence, a witness' prior consistent statements merely must tend to add weight or credibility to the witness' testimony. Further, it is well established that such corroborative evidence may contain new or additional facts when it tends to strengthen and add credibility to the testimony which it corroborates." Moreover, "if the previous statements

> are generally consistent with the witness' testimony, slight variations will not render the statements inadmissible, but such variations . . . affect [only] the credibility of the statement."

State v. Walters, 357 N.C. 68, 88-89, 588 S.E.2d 344, 356-57 (2003) (quoting *State v. Farmer*, 333 N.C. 172, 192, 424 S.E.2d 120, 131 (1993), and *State v. Martin*, 309 N.C. 465, 476, 308 S.E.2d 277, 284 (1983)).

Defendant contends that the statements to Nurse Gillespie and the treating physicians were "bare-bones," but that Patricia's statement to Major Lester "provided the State with evidence, not available from the medical records, which was necessary to convict [defendant] of many counts." Defendant does not identify any specific charge for which the evidence was insufficient without information in the statements to Major Lester, and our review of the evidence establishes that the statements of Patricia and Alice to health care personnel, in combination with the DNA evidence discussed below, provided sufficient evidentiary support for all of the charges that were submitted to the jury.

When Patricia spoke with the health care professionals who treated her shortly after she was assaulted, she described being kidnapped and subjected to forcible sexual intercourse and forcible oral sex with two men. The charges pertaining to Patricia that were submitted to the jury were two charges of first-degree rape, one charge of first-degree sex offense, and one charge of first-degree kidnapping. These charges were adequately supported by Patricia's statements to medical personnel. The charges submitted to the jury in which Alice was the alleged victim were two charges of first-degree rape, one charge of first-degree sex offense, and one charge of second-degree kidnapping. These charges were supported by the statements that Alice gave to medical personnel. Defendant does not specify which convictions required evidence contained only in the witnesses' statements to Major Lester and does not argue that the State's evidence was insufficient as to any element of any charged offense in the absence of Patricia's or Alice's statement to Major Lester. We conclude that this argument lacks merit.

Defendant also argues that the "State's dependence on the statements for substantive evidence is shown in the State's . . . closing argument." Defendant cites no authority, and we know of none, holding that the State's reference in a closing argument to arguably inadmissible evidence establishes that the State had offered insufficient evidence to convict a defendant without the challenged evidence.

Defendant additionally asserts that the trial court "used the police statements in charging the jury," citing a quote from the transcript in which defendant contends that the trial court was discussing information that "was only available in [Patricia's] statement to the police." However, the quote identified by defendant came not from the trial court's charge to the jury, but from a discussion between the trial court, the prosecutor, and defendant concerning which charges could properly be submitted to the jury. In fact, the prosecutor and the trial court dismissed those charges that were not adequately supported by the witnesses' statements in the hospital. Defendant also argues that the introduction of the witnesses' statements for substantive purposes is demonstrated by the fact that in the prosecutor's argument for the joinder of offenses for trial, he referred to information from these statements:

> The court also depended on the testimonial statements to grant the State's motion for joinder and for admission of 404(b) evidence, by finding the State had established sufficient facts relating to mode of operation, similar scheme and location, based on the State's list of similarities which was derived from the testimonial statements.

N.C. Gen. Stat. § 15A-926(a) (2015) provides in relevant part that two or more offenses may be joined for trial when the offenses are based "on a series of acts or transactions connected together or constituting parts of a single scheme or plan." In this case, the State's motion for joinder included the following circumstances that were not, as contended by defendant, "derived from the testimonial statements."

> 1. Location – All offenses were committed in Charlotte.
>
> 2. Date and Time – All offenses occurred late at night between May and August, 1991.
>
> 3. Victims - All of the victims were African-American females in their 20s who had been drinking.
>
> 4. Modus Operendi - In each case:
>
> a. The victim was walking before getting into a car with the assailants.
>
> b. The victim was physically assaulted in the car, and something was put on her head.
>
> c. Similar sexual assaults were perpetrated against each victim.

d. All of the victims were taken by car to an unknown location where the sexual assaults occurred.

5. DNA - In each case, defendant's DNA matched the DNA taken from evidence collected at the time of the assaults.

The circumstances noted above were sufficient to support the trial court's decision to allow joinder of the offenses, notwithstanding the fact that the State's motion for joinder also included the following circumstances included in the victims' statements to Major Lester, but not in their statements to medical personnel: (1) all of the victims were released at a location different from where they were abducted, and (2) the victims' descriptions to Major Lester of the car and the assailants' appearance were similar.

The record does not contain a formal written order allowing joinder, and "[t]he rule is that a trial judge sitting without a jury is presumed to have considered only the competent, admissible evidence and to have disregarded any inadmissible evidence that may have been admitted." *Woncik v. Woncik*, 82 N.C. App. 244, 249, 346 S.E.2d 277, 280 (1986) (citing *City of Statesville v. Bowles*, 278 N.C. 497, 180 S.E. 2d 111 (1971)). We conclude that the trial court's ruling allowing joinder was supported by the circumstances established from sources other than Patricia's and Alice's statements to Major Lester, and that the record contains no basis on which to assume that the trial court relied upon other factors.

Defendant further contends that the admission of the testimony of Ms. Eva Fernandez pursuant to North Carolina Rule of Evidence 404(b) was dependent upon details found only in Patricia's and Alice's statements to Major Lester. Defendant argues that in the State's argument to the trial court for admission of this evidence, the State referred to the specific location in Charlotte where Ms. Fernandez was picked up, and linked it to the location where Patricia had been dropped off, and that this information was only found in Patricia's statement to Major Lester. However, there were significant similarities between the charged offenses and Ms. Fernandez's experience. In 1991, Ms. Fernandez, like the other victims, was walking in Charlotte at night, was intoxicated, and accepted a ride from two unknown African-American men. Once she was in the car, the men hit her on the head with "something silver" and put a cloth over her head. Fortunately, Ms. Fernandez was able to escape from the car. We conclude that these similarities, not derived from Patricia's statement to Major Lester, were sufficient to support the trial court's admission of the evidence. The record does not contain a written or oral order indicating that the trial court relied upon

inadmissible evidence, and we presume that the trial court based its ruling on admissible evidence. Therefore, even if the prosecutor improperly referred to the location where Patricia was released in his argument for admission of Ms. Fernandez's testimony, there is no basis upon which to conclude that the trial court based its ruling in part upon this information. We also note that defendant did not object in the presence of the jury to Ms. Fernandez's testimony, and does not argue on appeal that it was inadmissible.

Defendant also argues that the statements given by Patricia and Alice to Major Lester provided the only evidence to support certain "indicted" charges. However, at the close of all the evidence the trial court, the prosecutor, and defendant reviewed the evidence and dismissed charges that were not supported by Patricia's and Alice's statements to health care personnel. Defendant specifically limits his argument to "indicted" offenses and does not challenge the evidentiary support for the charges that were actually submitted to the jury.

The only basis for defendant's argument that the statements were inadmissible is that they were admitted for the truth of the matters asserted. We have rejected this argument and conclude that (1) the statements were admissible to corroborate the witnesses' statements to medical personnel, and (2) there was sufficient evidence to support submission of the various charges to the jury based on the witnesses' statements to medical personnel and on the overwhelming statistical likelihood that defendant's DNA matched that found on the victims.

Finally, defendant argues that the details in the statements increased the likelihood of a verdict based on emotion. We have concluded that it was not error to admit the witnesses' statements. Accordingly, we do not reach defendant's argument that the alleged error was a constitutional violation. N.C. Gen. Stat. § 15A-1443(a) provides that a criminal defendant is prejudiced by non-constitutional errors only if "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant." In this case, defendant has failed to establish that there is a reasonable possibility that he would have been acquitted if the statements had been excluded.

For the reasons discussed above, we conclude that the trial court did not err by admitting the statements given by Patricia and Alice to Major Lester to corroborate the witnesses' statements to the medical personnel who treated them at the time of the assaults. Defendant's arguments to the contrary do not have merit.

III. Denial of Defendant's Motion for Retesting of DNA Samples

[2] Defendant argues next that the trial court erred by denying his motion seeking funds with which to hire an expert to retest the DNA samples. We disagree.

In October 2009, Charlotte Mecklenburg Police Department DNA team leader Eve Rossi, who testified at trial as an expert in forensic DNA analysis, conducted DNA testing of evidence obtained in the assault cases of Patricia, Alice, and Louise, and found an unknown DNA profile that was common to all three cases. In March 2011, defendant voluntarily provided a buccal swab from which a DNA profile could be established. In April 2011, Ms. Rossi conducted a DNA analysis of the sample obtained from defendant and found that it matched the DNA profile of the unknown subject identified in the three cases.

When Ms. Rossi was asked to quantify the statistical probability that the DNA obtained from evidence collected in Alice's case had originated from someone other than defendant, she testified that the "probability of selecting an unrelated person at random who could be the source of that major DNA profile within the vaginal swabs is approximately 1 in 60.6 trillion." Ms. Rossi explained that this probability meant that she "would need to look at or do DNA typing on 60.6 trillion individuals to find somebody else who would have a DNA profile that also matched that DNA profile from the vaginal swabs." Regarding the match between defendant's DNA profile and the DNA samples obtained from Patricia, Ms. Rossi testified that the probability of selecting an unrelated person at random who could be the source of the major DNA profile obtained in that case was approximately 1 in 1.62 quadrillion. For Louise's case, Ms. Rossi testified that the statistical probability of selecting an unrelated person at random who could be the source of that DNA profile was approximately 1 in 323 billion. Ms. Rossi also testified that the earth's population was approximately 7.2 billion.

Prior to trial, defendant retained Dr. Maher Noureddine to perform a review of Ms. Rossi's analysis of the DNA samples and prepare a report summarizing the results of his examination. In his report, Dr. Noureddine criticized certain procedures used in the DNA analysis and took issue with some of Ms. Rossi's characterizations of the degree of similarity between various DNA samples. However, Dr. Noureddine did not dispute the ultimate results of the DNA analysis. After Dr. Noureddine submitted his report, defendant filed a *pro se* motion for funding with which to hire another expert to retest the DNA samples. The trial court denied defendant's motion in an order finding in relevant part that:

1. The Defendant is charged with multiple felonies related to alleged sexual assaults that took place with three alleged victims in 1991.

2. There is DNA evidence in all three cases which has been tested by the State and purports to link the Defendant to the alleged crimes.

3. Defendant seeks to have the DNA evidence retested by a defense expert.

4. Previously appointed counsel for the Defendant retained the services of a DNA expert, Dr. Noureddine.

5. Dr. Noureddine reviewed the DNA analysis performed by the State and took exception to the some of the procedures followed by the State, but did not conclude that the DNA analysis, had it been performed differently, would have reached a different result.

6. Dr. Noureddine did not recommend the use of a new, more accurate testing procedure that was not available at the time of the State's DNA test.

A trial court's determination as to whether to provide funding for expert evaluation of evidence rests within the trial court's discretion and will not be disturbed absent a showing of abuse of that discretion. *State v. Gardner*, 311 N.C. 489, 498-99, 319 S.E.2d 591, 598 (1984). Defendant argues that the trial court abused its discretion and challenges the evidentiary support for the trial court's statements in Findings Nos. 5 and 6, that Dr. Noureddine "did not conclude that the DNA analysis, had it been performed differently, would have reached a different result" and that Dr. Noureddine "did not recommend the use of a new, more accurate testing procedure that was not available at the time of the State's DNA test." Defendant argues that because "Dr. Noureddine's report finds procedures, analysis and conclusions of the CMPD crime laboratory to be contrary to accepted scientific practice, suggests re-testing evidence and finds one conclusion to be overreaching and absurd, the court's findings of fact and conclusions of law are incorrect." However, the criticisms that defendant notes from Dr. Noureddine's report do not identify any statement or conclusion by Dr. Noureddine either that "the DNA analysis, had it been performed differently, would have reached a different result," or that there currently exists "a new, more accurate testing procedure that was not available at the time of the State's DNA test." As a result, defendant's contentions do not establish that the trial court's findings were not supported by the evidence.

Dr. Noureddine had several criticisms of the procedures and methodology employed by the State's analysts, including the following:

> 1. Dr. Noureddine criticized the lab for performing the analysis of two cases at the same time, because this might increase the chance of contamination.
>
> 2. Dr. Noureddine criticized the quality of the DNA sample obtained from Patricia and suggested that the lab should have "considered" repeating the analysis of the cheek swab from Patricia.
>
> 3. Dr. Noureddine criticized the terminology used by the State lab in characterizing a particular DNA profile as a "major contributor" instead of a "partially predominant" contributor and in using the term "match" to describe the relationship between Louise's DNA and that found in the evidence from Louise's case.
>
> 4. In Patricia's case, Dr. Noureddine was concerned about whether the samples had been properly sealed.

In Dr. Noureddine's report, he summarized the procedures used to conduct the DNA analysis and noted that in each case the State had made statistical calculations regarding the match between defendant's DNA and that obtained from the evidence collected in 1991. Significantly, in his report Dr. Noureddine does not express any doubt or concern regarding the statistical conclusions reached by the State. In other words, Dr. Noureddine's report does not dispute the ultimate conclusion reached in each case that it was statistically all but impossible for anyone other than defendant to have been the source of the DNA profiles obtained from the evidence. Instead, Dr. Noureddine's "Final Conclusion" is that "[b]ased on the forensic DNA and serology evidence that was developed by the CMPD Lab for case #s 1991-0507-040800, 1991-0716-000400, and 1991-0812-042601, it is my conclusion that Mr. Thompson cannot be excluded as a potential contributor of DNA in all three cases."

We conclude that the trial court accurately summarized the results of Dr. Noureddine's analysis and did not abuse its discretion by denying defendant's motion seeking funds with which to hire an expert to retest the DNA samples.

IV. Instruction on Acting in Concert

[3] Finally, defendant argues that the trial court committed plain error by instructing the jury in such a manner that defendant "could be found

guilty either by acting by himself or acting together with another in violation of the prohibition against double jeopardy." Defendant cites *State v. Graham*, 145 N.C. App. 483, 549 S.E.2d 908 (2001), in support of his contention. However, in *Graham*, the verdict sheets submitted to the jury included one verdict sheet asking the jury to determine whether the defendant was guilty of committing a particular offense alone and another, separate, sheet asking the jury to decide whether the defendant was guilty of the same offense, either acting alone or with another. On the facts of *Graham*, the jury might have convicted the defendant twice for the same offense, once for acting alone and once for acting either alone or with another. No such circumstance is present in this case.

For the reasons discussed above, we conclude that defendant had a fair trial, free of reversible error.

NO ERROR.

Judges STEPHENS and McCULLOUGH concur.

STATE OF NORTH CAROLINA
v.
TYRONE TY WATSON, DEFENDANT

No. COA15-1360

Filed 18 October 2016

Juveniles—waiver of right to have parent present during interrogation—wrong box initialed on form

Where the trial court found that juvenile defendant initialed the box on the Juvenile Waiver of Rights form indicating that his mother was present and he wished to answer questions, that the indication of the mother's presence was an error on the part of both the officer and defendant, and that defendant did not request the presence of his mother, there was sufficient support for the conclusion that defendant did not invoke his right to have his mother present and validly waived his right to have a parent present during the interrogation.

Appeal by Defendant from order entered 28 May 2015 by Judge Carla N. Archie and judgment entered 8 July 2015 by Judge Yvonne

Mims Evans in Mecklenburg County Superior Court. Heard in the Court of Appeals 27 April 2016.

Attorney General Roy Cooper, by Assistant Attorney General Scott A. Conklin, for the State.

Appellate Defender G. Glenn Gerding, by Assistant Appellate Defender Hannah H. Love, for Defendant-Appellant.

INMAN, Judge.

Tyrone Ty Watson ("Defendant") appeals from an order entered 28 May 2015 denying his motion to suppress and a judgment entered 8 July 2015 following his guilty plea to a charge of attempted robbery with a dangerous weapon. On appeal, Defendant contends that the trial court erred in denying his motion to suppress statements made to a police officer during an interrogation outside of the presence of Defendant's parent. After careful review, we hold that Defendant was advised of his right to have a parent present pursuant to N.C. Gen. Stat. § 7B-2101, that Defendant failed to invoke this right, and that Defendant therefore waived this right. Accordingly, we hold that the trial court did not err in denying Defendant's motion to suppress his statements to the officer.

Factual & Procedural History

On 8 July 2014, Officers Jeffrey King and Roman McNeil of the Charlotte-Mecklenburg Police Department ("CMPD") went to Defendant's home to serve an arrest warrant. Defendant's mother told the officers that Defendant was on his way home on a city bus. The officers subsequently stopped the bus, removed Defendant, and arrested him. CMPD Officers Mathew Daly and Jacob Powell transported Defendant to the Providence Divisional Team Office. Defendant was placed in an interview room, handcuffed, and shackled to the floor.

Approximately twenty minutes from the time Defendant arrived at the precinct, CMPD Crime Scene Detective Thomas Grosse ("Detective Grosse") entered the room where Defendant was handcuffed and shackled, and initiated an audio-recorded interrogation. Defendant stated that he was sixteen years old, that his birthday was 3 October 1997, and that he was about to re-enter the tenth grade. He also stated that he resided with his mother, Rhonda Stevenson, at an apartment on Marvin Road. Detective Grosse and Defendant then engaged in the following colloquy:

> Detective Grosse: Do you have any idea why you are here?
>
> Defendant: They say that I got a warrant.
>
> Detective Grosse: Okay. Well, before I can go in and explain it. You know you've seen the movies so I just got to go through all of this. You got the right to remain silent. That means you don't have to say or do anything or answer questions. Anything I say can be used against me. You have the right to have a parent, guardian or custodian here with you now during questioning. Parent means your mother, father, stepmother, stepfather. Guardian means person responsible for you or taking care of you. Custodian means the person that is the charge where you are staying – that is like a foster home, doesn't really apply to you. You have the right to speak to an attorney before questioning. You have a right to have an attorney present during question[ing]. If you want to have a lawyer during questioning, one will be provided to you at no cost before you're questioned. Okay. And your mother would be Rhonda Stevenson, if you wanted her to be here. You can read?
>
> Defendant: Yeah.
>
> Detective Grosse: Basically, this is the form [the Juvenile Waiver of Rights form]. I need you to initial here that I read it. That way I don't get in trouble. You can read over it—it's basically everything I just said to you.

Detective Grosse filled in Defendant's name, age, birthdate, address, and school year in the bank spaces at the top of the Juvenile Waiver of Rights form. Detective Grosse also filled in his own name, indicating that he had informed Defendant of his rights, including his *Miranda* rights and the right to have a parent present when questioned. At the bottom of the form, the juvenile suspect is instructed to select one of two boxes specifying either that he/she is electing to answer questions: (1) in the presence of a "lawyer, parent, guardian, and/or custodian" or (2) without a "lawyer, parent, guardian, and/or custodian" present. Before handing the form to Defendant, Detective Grosse filled in two blank spaces in the first box so that it read as follows:

> My lawyer, parent, guardian, and/or custodian is/are here with me now. The name(s) of the person(s) here with me is/are: *Ronda [sic] Stevenson*. I understand my rights as explained by Officer/Detective *Grosse*, and I DO wish to

> answer questions at this time. My decision to answer questions now is made freely and is my own choice. No one has threatened me in any way or promised me special treatment. Because I have decided to answer questions now, I am signing my name below.

After filling in the blanks, Detective Grosse gave Defendant the Juvenile Waiver of Rights Form. Defendant initialed each of the five rights listed on the form, indicating that Detective Grosse had explained each right and that Defendant understood each right. At the bottom of the form, Defendant also wrote his initials next to the first box, erroneously indicating that his mother was present with Defendant at that time. Defendant did not initial the second box, which Detective Grosse had not filled in or asked Defendant to review and initial. The second box stated:

> I am 14 years old or more and I understand my rights as explained by Officer/Detective _____. I DO wish to answer questions now, WITHOUT a lawyer, parent, guardian, or custodian here with me. My decision to answer questions now is made freely and is my own choice. No one has threatened me in any way or promised me special treatment. Because I have decided to answer questions now, I am signing my name below.

Both Defendant and Detective Grosse signed the Juvenile Waiver of Rights Form. Detective Grosse then proceeded to interrogate Defendant and Defendant made statements incriminating himself in an attempted robbery.

On 28 July 2014, Defendant was indicted on a charge of attempted robbery with a dangerous weapon in violation of N.C. Gen. Stat. § 14-87. On 8 April 2015, Defendant moved to suppress his statement to Detective Grosse on the grounds that it was obtained in violation of the United States Constitution, the North Carolina Constitution, and N.C. Gen. Stat. § 14-87.

On 28 May 2015, Defendant's motion came on for hearing during the Criminal Session of Mecklenburg County Superior Court, Judge Carla N. Archie presiding. On the same day, Judge Archie orally denied Defendant's motion to suppress, making the following findings of fact and conclusions of law:

> On July 8th, 2014, officers went to the home of the defendant, Tyrone Watson, in order to serve an arrest

warrant, that the defendant was not present, and the officers returned sometime later. On their second visit, the defendant's mother informed the officers that he was on a city bus on his way home. Officers stopped a city bus on or about Randolph Road in Charlotte, Mecklenburg County.

Officers executed the arrest warrant, placing him under arrest and transferring him to the custody of different officers to transport him to the Providence divisional precinct.

At the precinct the defendant was placed into an interview room, he was shackled to the floor and handcuffed at the wrist and later interviewed by Detective Thomas Grosse.

Prior to the interview, Detective Grosse reviewed the juvenile waiver of rights form with the defendant. At the time of the interview the defendant was 16 years of age and had partially completed the tenth grade. Detective Grosse read each of the rights to the defendant numbered one through five, and Detective Grosse filled in Checkbox Number 1 indicating that Rhonda Stevenson, the defendant's mother, was present at the time. Detective Grosse also filled in the blank indicating that he had explained the rights to the defendant. Defendant Grosse asked the defendant to initial each of the rights indicating that he understood each of the numbered rights one through five, that the defendant did initial each of those rights.

The defendant also initialed the first check box, which on its face indicates that the defendant's mother, Rhonda Stevenson, is here with me now, that he understood the rights as explained by Officer Grosse, and did wish to answer questions.

The defendant then signed the bottom of the form and proceeded to answer Officer Grosse's questions and otherwise participate in the conversation and ultimately made incriminating statements.

Having considered the testimony and having reviewed the video, the Court finds that the defendant's mother was not present, that the defendant did not request the presence of his mother, and that the indication on the

> juvenile waiver of rights form, which says that Rhonda Stevenson is here now, was both an error on the part of the officer and the defendant. However, the Court finds that the defendant was advised of his rights, that there is no credible evidence of a request for his mother, and that the waiver of his rights was knowing, voluntary, and intelligent.
>
> The Court, therefore, concludes as a matter of law that any statements made thereafter are admissible, and the defendant's motion to suppress is denied.

On 8 July 2015, before Judge Yvonne Mims Evans in Mecklenburg County Superior Court, Defendant pleaded guilty to attempted robbery with a dangerous weapon and was sentenced as a prior record Level I Offender to an active term of 42 to 63 months imprisonment. Defendant gave notice of appeal in open court.

Analysis

In reviewing an order denying a motion to suppress, this Court determines "whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Johnson*, 98 N.C. App. 290, 294, 390 S.E.2d 707, 709 (1990) (internal quotation marks and citation omitted). "We review the trial court's conclusions of law *de novo*." *State v. Brow*n, 217 N.C. App. 566, 571, 720 S.E.2d 446, 450 (2011) (citations omitted). "To determine whether the interrogation has violated defendant's rights, we review the findings and conclusions of the trial court." *State v. Branham*, 153 N.C. App. 91, 95, 569 S.E.2d 24, 27 (2002).

Defendant contends that his statutory right to have a parent present during questioning was violated when Detective Grosse continued to question Defendant after he invoked his right to have his mother present. Specifically, Defendant argues that by declining to initial the box stating that he was waiving his right to have his parent or lawyer present during questioning, he "expressly elected not to waive his right to counsel or the presence of his parent[,]" and that by initialing the box stating that his mother was present, he "unambiguously indicated that he wanted his mother present during his questioning." Defendant further asserts that if even if his invocation of his right to have a parent present was ambiguous, Detective Grosse's failure to clarify whether Defendant wanted his mother present during the questioning constituted error sufficient to

warrant the suppression of Defendant's statement to Detective Grosse. In light of the trial court's findings of fact, we disagree.

Section 7B-2101 of the North Carolina General Statutes sets out the provisions governing juvenile interrogations. The statute mandates that prior to questioning a juvenile in custody, an officer must advise the juvenile of the following:

> (1) That the juvenile has a right to remain silent;
>
> (2) That any statement the juvenile does make can be and may be used against the juvenile;
>
> (3) That the juvenile has a right to have a parent, guardian, or custodian present during questioning; and
>
> (4) That the juvenile has a right to consult with an attorney and that one will be appointed for the juvenile if the juvenile is not represented and wants representation.

N.C. Gen. Stat. § 7B-2101(a) (2015). Section 7B-2101 further provides that "[b]efore admitting into evidence any statement resulting from custodial interrogation, the court shall find that the juvenile knowingly, willingly, and understandingly waived the juvenile's rights." N.C. Gen. Stat. § 7B-2101(d). "The burden rests on the State to show the juvenile defendant made a knowing and intelligent waiver of his rights." *State v. Johnson*, 136 N.C. App. 683, 693, 525 S.E.2d 830, 836 (2000). A juvenile is defined as a person younger than eighteen who is not married, emancipated, or a member of the armed forces of the United States. N.C. Gen. Stat. § 7B-101(14) (2015).

During a police interrogation, "[o]nce a juvenile defendant has requested the presence of a parent, or any one of the parties listed in the statute, defendant may not be interrogated further 'until counsel, parent, guardian, or custodian has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.' " *Branham*, 153 N.C. App. at 95, 569 S.E.2d at 27 (alteration omitted) (quoting *Michigan v. Jackson*, 475 U.S. 625, 626, 89 L.Ed.2d 631, 636 (1986)).

In this case, the trial court classifies its statement that "[D]efendant did not request the presence of his mother" as a finding of fact. Defendant asserts that whether Defendant invoked his right to have a parent present during questioning is a question of law, not fact, and therefore warrants a *de novo* review. The State analyzes the determination as a finding of fact, subject to the more deferential standard.

"The classification of a determination as either a finding of fact or a conclusion of law is admittedly difficult. As a general rule, however, any determination requiring the exercise of judgment, . . . or the application of legal principles, . . . is more properly classified a conclusion of law." *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (citations omitted). The trial court's classification of a determination as one of fact or law "is not determinative, and, when necessary, the appellate court can reclassify an item before applying the appropriate standard of review." *N.C. State Bar v. Key*, 189 N.C. App. 80, 88, 658 S.E.2d 493, 499 (2008) (citation omitted).

The trial court's determination that "[D]efendant did not request the presence of his mother" is best considered a mixed question of fact (whether Defendant indicated that he wanted his mother to be present) and law (whether Defendant's indication was sufficient to invoke his legal right to have his mother present before the interrogation could continue).

> With regard to mixed questions of law and fact, the factual findings . . . are conclusive on appeal if supported by any competent evidence. As with separate findings of fact and conclusions of law, the factual elements of a mixed finding must be supported by competent evidence, and the legal elements must, in turn, be supported by the facts.

Rolan v. N.C. Dep't of Agric. & Consumer Servs., 233 N.C. App. 371, 379-80, 756 S.E.2d 788, 794 (2014) (citations omitted); *see also Beach v. McLean*, 219 N.C. 521, 525, 14 S.E.2d 515, 518 (1941) (holding that a trial court's determination of a mixed question of fact and law is conclusive "provided there is sufficient evidence to sustain the element of fact involved[]").

The trial court's purely factual findings independent of the one challenged on appeal included: (1) a finding that Defendant "initialed the first check box [on the Juvenile Waiver of Rights form], which on its face indicates that[D]efendant's mother, Rhonda Stevenson, is here with me now, that he understood the rights as explained by Officer Grosse, and did wish to answer questions[;]" and (2) a finding that "the indication on the [J]uvenile [W]aiver of [R]ights form, which says that Rhonda Stevenson is here now, was both an error on the part of the officer and[D]efendant." The finding that Defendant's initial next to the first box was merely an error is consistent with the factual finding that Defendant did not indicate that he wanted his mother present. In making these two findings, the trial court resolved conflicts in evidence, a role exclusive

to the trier of fact. *State v. Overocker*, 236 N.C. App. 423, 428, 762 S.E.2d 921, 925, *writ denied*, *review denied*, 367 N.C. 802, 766 S.E.2d 846 (2014) (holding that "deference is afforded the trial judge because he is in the best position to weigh the evidence, given that he has heard all of the testimony and observed the demeanor of the witnesses") (internal quotation marks and citation omitted). That the evidence could have been interpreted differently, as Defendant argues, is not a basis to reverse the trial court. *State v. Eason*, 336 N.C. 730, 745, 445 S.E.2d 917, 926 (1994) ("A trial court's findings of fact following a hearing on the admissibility of a defendant's statements are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.").

Considering the separate factual findings as well as the factual element of the finding challenged by Defendant, and assuming that the issue of whether Defendant effectively invoked his right to have his mother present during the interrogation or refused to waive that right presents a question of law subject to *de novo* review, we hold that the factual findings support the conclusion that Defendant did not invoke his right to have his mother present and validly waived his right to have parent present during the interrogation.

Defendant contends that assuming the record is ambiguous as to whether he invoked his right to have his parent present, the trial court still erred in denying his motion to suppress because Detective Grosse failed to clarify whether Defendant intended to waive his statutory right to have a parent present. In *State v. Saldierna*, __ N.C. App. __, __, 775 S.E.2d 326, 327, *review allowed*, *writ allowed*, 368 N.C. 356, 776 S.E.2d 846 (2015), this Court concluded that a juvenile's ambiguous statement regarding his/her right to have a parent present "triggers a requirement for the interviewing officer to clarify the juvenile's meaning." *Id.* at __, 775 S.E.2d at 334.

The North Carolina Supreme Court has allowed the State's petition for Writ of Supersedeas and petition for discretionary review and has not yet issued a decision. *Saldierna*, 368 N.C. 356, 776 S.E.2d 846. Therefore, the issue of whether an officer is required to clarify a juvenile's ambiguous statement regarding his/her right to have a parent present for questioning is still unsettled. However, for purposes of this opinion, we need not address the applicability of *Saldierna* because the trial court in this case found that Defendant did not make a statement, ambiguous or otherwise, invoking his right to have a parent present during the interrogation. The trial court did not find that by initialing the first box on the Juvenile Waiver of Rights Form, Defendant ambiguously invoked his

right to have his mother present for questioning. Rather, the trial court found that Defendant's initialing of the box was an error.

Considering evidence supporting the trial court's finding that Defendant's initialing of the line next to the first box on the Juvenile Waiver of Rights form was an error, and considering evidence supporting the trial court's finding that Defendant did not request the presence of his mother or ask to contact her, we hold that Defendant never invoked his right to have his mother present for questioning.

Conclusion

For the aforementioned reasons, we hold that although Defendant was advised of his statutory right to have a parent present during police questioning, Defendant never invoked, either ambiguously or unambiguously, this right. As such, we affirm the trial court's denial of Defendant's motion to suppress his statement to police.

AFFIRMED.

Judges ELMORE and McCULLOUGH concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 18 OCTOBER 2016)

BOGGS v. N.C. DEP'T OF ENVTL. QUALITY No. 16-188	Office of Admin. Hearings (15OSP3279)	Affirmed
GRASINGER v. WILLIAMS No. 15-518	Wake (13CVS13297)	Affirmed
IN RE J.J. No. 16-225	Orange (14JT28)	Affirmed
IN RE J.J. No. 16-281	Orange (14JT28)	Affirmed
IN RE M.R. No. 16-192	Rowan (14JA226-230)	Affirmed in part; vacated and remanded in part
IN RE R.G.B. No. 16-328	Sampson (15JA49-50)	Affirmed
IN RE T.H.H. No. 16-301	New Hanover (14JT243)	Affirmed
KIRKMAN v. N.C. DEP'T OF PUB. SAFETY No. 16-119	N.C. Industrial Commission (13-731311)	Affirmed
MERRILL v. WINSTON-SALEM FORSYTH CTY. BD. OF EDUC. No. 16-232	Forsyth (15CVS5553)	Affirmed
PEOPLES v. TUCK No. 16-293	Vance (15CVS12)	Reversed
STATE v. BISHOP No. 16-276	Mecklenburg (13CRS230122)	No Error
STATE v. BOWSER No. 15-1232	Camden (13CRS50019) (13CRS50026)	No Error in part; Vacated and Remanded in part.
STATE v. CANNON No. 15-1272	Pitt (14CRS55689)	No Error
STATE v. COLLINS No. 16-60	Wake (10CRS226107) (11CRS7962)	No Error

STATE v. HENDRICKS No. 16-367	Mecklenburg (14CRS208667) (14CRS208668)	Dismissed
STATE v. HOPKINS No. 15-941	Nash (09CRS57101-02)	Reversed and Remanded for New trial
STATE v. JONES No. 16-290	Guilford (14CRS24373) (14CRS24375) (14CRS75911) (14CRS75913) (14CRS75914) (14CRS77247)	No Error
STATE v. MANNO No. 16-361	Cleveland (12CRS3538-40)	Affirmed
STATE v. SANCHEZ No. 15-1401	Wake (13CRS230214-215)	New Trial
STATE v. SMITH No. 16-236	Forsyth (14CRS060384) (14CRS735784)	No Error
STATE v. SOLOMON No. 16-2	Johnston (13CRS2646) (13CRS55281)	No error in part; No plain error in part.
STATE v. WALL No. 15-1235	Davie (13CRS51357) (13CRS51359) (14CRS7)	No Error

COMMERCIAL PRINTING COMPANY
PRINTERS TO THE SUPREME COURT AND THE COURT OF APPEALS